

MISSISSIPPI LAW JOURNAL



IN PERSONAM JURISDICTION UNDER MISSISSIPPI'S LONG ARM STATUTE

William H. Brown and Sam E. Scott

JOINT TORTFEASORS - A CASE FOR UNLIMITED CONTRIBUTION

Harry R. Allen

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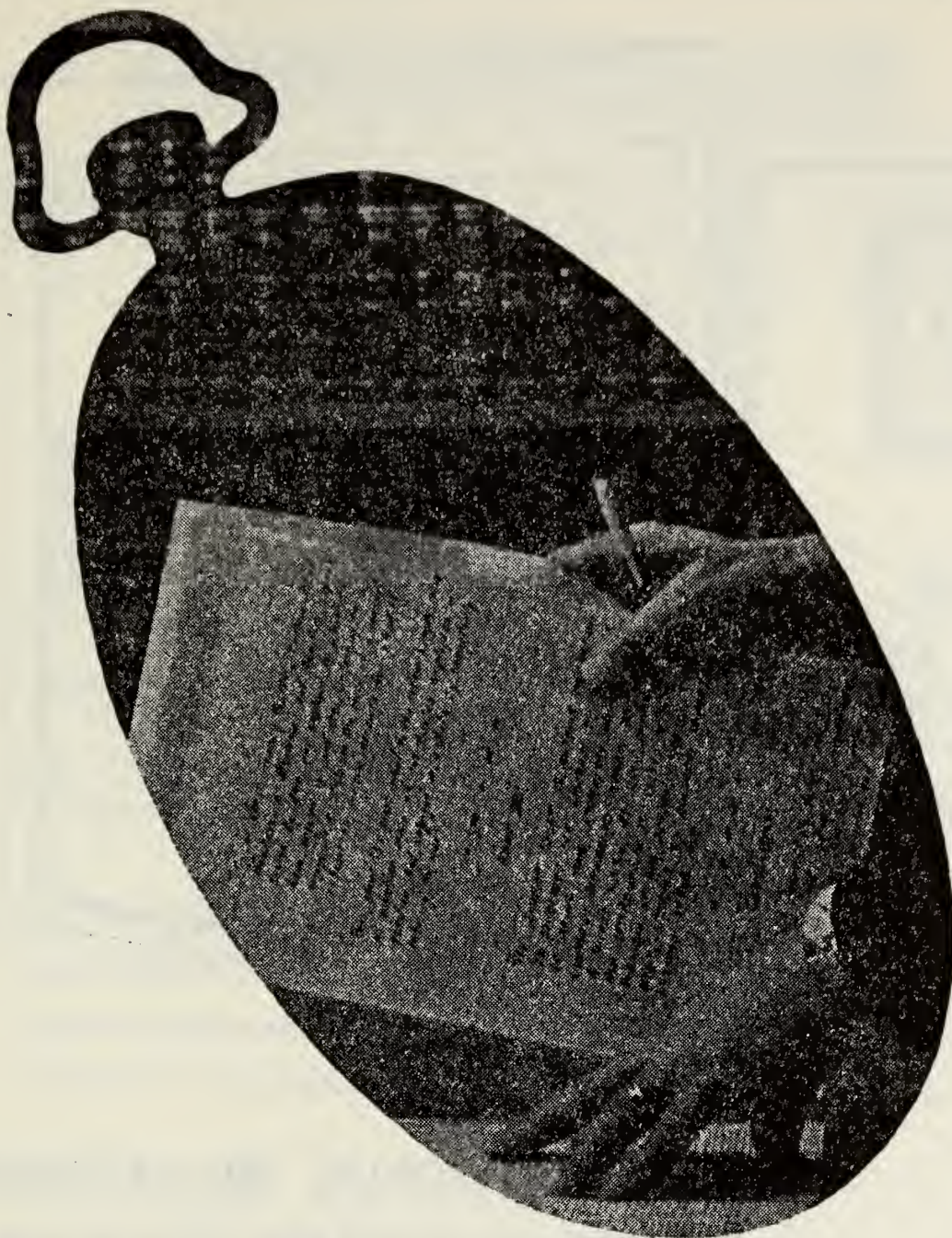
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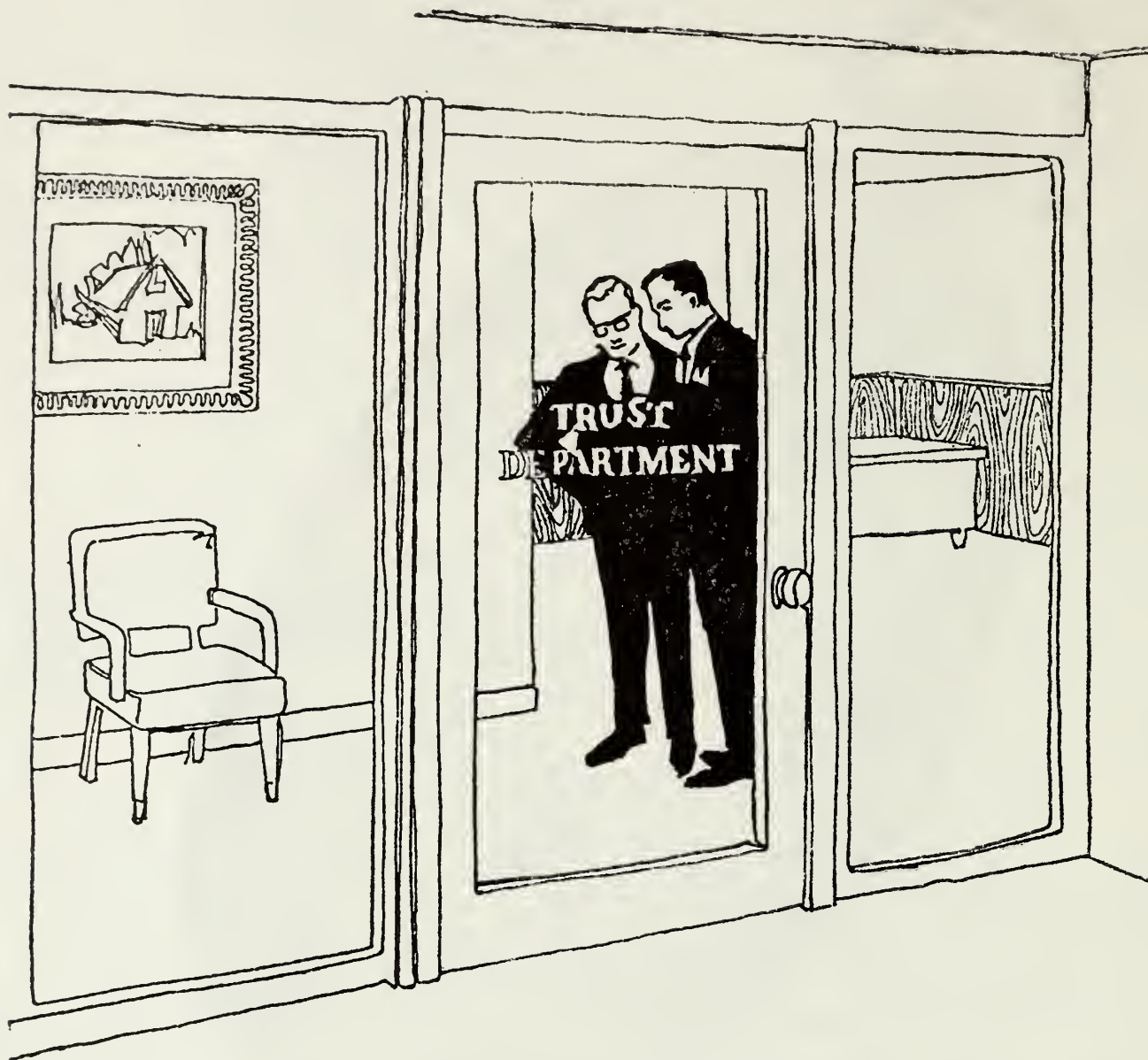
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IN PERSONAM JURISDICTION UNDER MISSISSIPPI'S LONG ARM STATUTE

William H. Brown, Jr. and Sam E. Scott*

I. DUE PROCESS AND THE ORIGINAL LONG ARM STATUTE

Mississippi practitioners have long been plagued with the problem of how to subject nonresidents to suit in this state when personal service of process could not be effected within the boundaries of the forum.¹ Prior to 1940 in personam jurisdiction could not be acquired over a nonresident defendant unless he was personally served with process within the state, was a foreign corporation found to be doing business herein,² or was subject to service of process under the nonresident motorist statute.³ In order to remedy this problem the Mississippi legislature in 1940⁴ enacted this state's first long arm statute.⁵ This statute provided for service of process over nonresident individuals, firms, partnerships and foreign corporations not qualified to do business in this state "... who shall do any business or perform any character of work in this State. . . ."⁶ The doing of such business or the performance of such work was deemed as a signification of the nonresident's agreement that the Secretary of State of Mississippi was to serve as agent for service of process in any action growing out of the work or services in question.⁷ It is the purpose of this article to trace the development of in personam jurisdiction⁸ under Mississippi's long arm statute from its inception to the present and by analyzing the cases decided thereunder to provide some insight into its practical application.

The original statute was posited in terms of whether the nonresident was "doing business" within the forum probably because of the decision

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¹See, e.g., *Lee v. Memphis Publishing Company*, 195 Miss. 264, 14 So. 2d 351 (1943).

²MISS. CODE ANN. § 4166 (1930).

³MISS. CODE ANN. §§ 1845, 1846 (Supp. 1938).

⁴See Comment, *The Recent Mississippi Statute Conferring Jurisdiction Over Non-resident Individuals and Partnerships*, 13 Miss. L.J. 559 (1941).

⁵Gen. Laws Miss. 1940 ch. 246.

⁶*Id.*

⁷*Id.*

⁸The term "jurisdiction" as used in this article refers to the power of the court to render a valid judgment, adjudicating the rights of parties as between themselves. In rem and quasi in rem jurisdiction are not within the scope of this discussion.

of *Pennoyer v. Neff*⁹ and its progeny. In *Pennoyer* the United States Supreme Court held that the due process clause of the fourteenth amendment¹⁰ required that for a state court to exercise jurisdiction over a nonresident defendant, he must be physically present within the forum or consent to the court taking jurisdiction.¹¹ This requirement came to be known as the "physical power doctrine." Since a literal interpretation of this doctrine tended to be restrictive in nature, it was not long before various legal fictions were developed in order to find that a nonresident was "present" within the forum or had "consented" to the assertion of jurisdiction.¹² The "doing business" test was one of the exceptions carved out of the physical power doctrine.¹³ In an early article which treated Mississippi's long arm statute this test was discussed as follows:

The first deviation from the physical power doctrine, as applied to proceedings in personam, arose in cases involving foreign corporations. But rather than overrule *Pennoyer v. Neff*, or specifically create an exception to it, the Supreme Court of the United States chose to create fictions in order to bring its holding within the rule of *Pennoyer v. Neff*. Since personal jurisdiction, under physical power, could only be acquired by consent or presence; the Court created the "doing business" test by an application of what has become known as the "implied consent" and "presence" fictions. A state has the power, reasoned the Court, to arbitrarily exclude a foreign corporation from doing business in the state (power of exclusion theory); and having that power, it also has the power to set up conditions for its admission into the state, one of which is to compel it to submit to the jurisdiction of the courts of the state. In other cases, the Court reasoned that the doing of business by a foreign corporation indicated that it was present within the state for purposes of personal jurisdiction.

.....

Although these fictions were clearly artificial, they served their purpose, which was to extend the personal jurisdiction of the

⁹95 U.S. 714 (1878).

¹⁰U.S. CONST. amend. XIV.

¹¹95 U.S. at 733.

¹²See, e.g., *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935); *Hess v. Pawloski*, 274 U.S. 352 (1927); *International Harvester v. Kentucky*, 234 U.S. 579 (1914); *Green v. Chicago, Burlington & Quincy Ry.*, 205 U.S. 530 (1907); *Old Wayne Mutual Life Ass'n. v. McDonough*, 204 U.S. 8 (1907); and *St. Clair v. Cox*, 106 U.S. 350 (1882).

¹³See Comment, *In Personam Jurisdiction Over Nonresidents*, 29 Miss. L.J. 91 (1957).

state courts over nonresidents and at the same time preserve the rule of *Pennoyer v. Neff*. . . .¹⁴

This seems to be the only reasonable explanation for the "doing business" concept incorporated in Mississippi's first long arm statute. In 1945 the requirements of due process were substantially relaxed by the United States Supreme Court in the case of *International Shoe Co. v. Washington*,¹⁵ which is thought by many to be the single most important decision ever rendered in this field.¹⁶ The *International Shoe* case involved a suit by a state commission against a nonresident corporation to recover company contributions to a state unemployment commission fund. International Shoe Company was a Delaware corporation with its principal office in St. Louis, Missouri, employing eleven to thirteen salesmen who regularly solicited orders in the state of Washington. The company maintained no regular office space in the state, on occasion renting space for exhibiting its wares, maintained no stock or merchandise therein, and made no intrastate deliveries. The primary contention of the defendant was that it was not "present" within the state of Washington and therefore could not be subjected to jurisdiction of the Washington court. Establishing new criteria for the requirements of due process, the Court did away with the "consent" and "presence" theories and held that a nonresident was subject to in personam jurisdiction if he had certain "minimum contacts" with the forum state and the assumption of jurisdiction would not offend traditional notions of fair play and substantial justice.¹⁷

The next significant development in the Supreme Court's continuing formulation of the requirements of due process came in the case of *McGee v. International Life Insurance Co.*¹⁸ In this case the Court upheld the constitutionality of a California statute¹⁹ which permitted residents to bring suit against nonresident insurance companies on policies of insurance solicited from outside the state by mail. The Court was of the opinion that due process was satisfied by the fact that ". . . the suit was based on a contract which had substantial connection with that state."²⁰ Commenting on the trend of expansion of state jurisdiction

¹⁴*Id.* at 91, 92.

¹⁵326 U.S. 310 (1945).

¹⁶See Reese, *Judicial Jurisdiction Over Non-Residents; The Impact of McGee v. International Life Insurance Company*, 13 Record of N.Y.C.B.A. 139, 146 (1958).

¹⁷326 U.S. at 316.

¹⁸355 U.S. 220 (1957).

¹⁹CAL. INS. CODE §§ 1610-20 (West 1955).

²⁰355 U.S. at 223.

over nonresidents, the Court noted that increasing nationalization of commerce and developments in communication and transportation made it less burdensome for a nonresident to defend himself in a state where he was economically engaged. This case represents a clear departure from the doctrine of *Pennoyer v. Neff*.

However, the full impact of the liberal interpretation of the "minimum contacts" doctrine announced in *McGee* had not been fully digested when limitations were imposed by the decision of *Hanson v. Denckla*.²¹ That case arose as the result of a dispute between a settlor, who was a resident of the State of Florida, and a Delaware corporation over part of the corpus of a trust held by the latter as trustee. In order to adjudicate the rights of the parties to the funds in question, a Florida court attempted to exercise jurisdiction over the trustee through constructive service. The only connection between the trustee and the state of Florida was certain correspondence between the trustee and the settlor, the exercise of his power of appointment over the trust by the settlor in Florida, and the receipt of trust income by the settlor there. The Supreme Court held that the Florida court could not properly assert jurisdiction over the nonresident defendant and reaffirmed the rule announced in earlier decisions that due process required that a nonresident have some "minimal contacts" with the forum state before jurisdiction could properly be asserted. In order to satisfy this "minimal contacts" requirement the defendant must have done some act within the state whereby it availed itself of the privileges of conducting activities within the forum (thus invoking the benefits and protections of the laws of the forum), and the cause of action must arise out of the activities of the defendant within the forum.²²

Thus, *International Shoe*, *McGee*, and *Hanson* firmly establish that the due process clause requires only a "minimal contact" with the forum for the assertion of in personam jurisdiction over a nonresident. However, it should be noted that although state courts must remain within the constitutional limitations imposed by these cases, they may adopt a more limited interpretation of the requirements of due process.²³ This has been the case in Mississippi. In order to properly illustrate the development of due process and the concept of doing business, a brief review of Mississippi decisions under the original long arm statute is necessary. It is felt that these early cases are vital to a full understanding of current decisions dealing with in personam jurisdiction, since the

²¹357 U.S. 235 (1958).

²²*Id.* at 251, 253.

²³*See, e.g., Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964).

basis for assertion of jurisdiction contained in the original statute (doing business) has been retained in the subsequent amendments to the statute.

The first case in which the Mississippi Supreme Court construed the long arm statute was *Lee v. Memphis Publishing Co.*,²⁴ which was to have controversial²⁵ but lasting effect upon future applications of the statute.²⁶ This case involved a libel suit by a resident of Mississippi against the Memphis Publishing Company, a Delaware corporation, which published the *Commercial Appeal* newspaper wherein the allegedly libelous statements appeared. The court held that the defendant was not "doing business" in Mississippi within the meaning of the long arm statute although the *Commercial Appeal* had a circulation of over 40,000 papers throughout this state, maintained a regular office in Jackson, Mississippi, which was run by one of its full-time employees, and had a large number of local distributors within the state who were managed by a full-time employee of the defendant.

*Sugg v. Hendrix*²⁷ was the first case which expressly ruled on the constitutionality of Mississippi's long arm statute. In *Sugg* the plaintiff, a resident of Mississippi, instituted suit against the defendant, a resident of Louisiana, to recover damages for personal injuries incurred while working for the defendant. The plaintiff sought to secure jurisdiction over the defendant under the Mississippi long arm statute, alleging that the defendant was engaged in extensive levee construction work in this state and that his injury had arisen out of such work. The defendant appeared specially, moving to quash service on the ground that the Mississippi statute was unconstitutional. In upholding the constitutionality of the long arm statute, the court relied heavily upon the decision of *Hess v. Pawloski*,²⁸ wherein the United States Supreme Court held that the state of Massachusetts, under its police power, could subject a nonresident motorist to suit in Massachusetts in any case arising out of the nonresident's use of the highways of that state. Drawing on dictum in that case, the Fifth Circuit Court of Appeals reasoned that if the Mississippi legislature had the power to require an employer, resident or nonresident, to carry workmen's compensation insurance for the protection of his employees, it could also require an employer to comply

²⁴195 Miss. 264, 14 So. 2d 351 (1943).

²⁵The dissent in *Lee* commented that the majority opinion taxed the credibility of the ordinary mind. 14 So. 2d at 355.

²⁶See *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964).

²⁷142 F.2d 740 (5th Cir. 1944).

²⁸274 U.S. 352 (1927).

with this state's laws subjecting them to suit for any injuries incurred by residents of this state as a result of their business activities herein. The court commented that in construing a statute of this nature the real question was whether or not it constituted the reasonable exercise of the police power of the state; and if it were determined that the statute was enacted for the protection of the health, safety, and welfare of residents, rather than as a mere attempt to extend the bounds of in personam jurisdiction, then it was constitutional.

In *Condon v. Snipes*²⁹ the constitutionality of the long arm statute was again raised. In that case the plaintiff, a Mississippi resident, instituted suit against a nonresident defendant, seeking to recover damages for a breach of contract. The defendant was engaged in the termite eradication business, and the controversy in question arose out of the defendant's treatment for termites of a building owned by the plaintiff. Service of process was effectuated under the Mississippi long arm statute, and the defendant moved to dismiss, alleging that assertion of jurisdiction was violative of due process. Upholding the validity of the long arm statute, the Mississippi Supreme Court noted that the defendant was engaged in a field (termite eradication) which was specifically regulated by the state under a statute enacted for the protection of the citizens of this state. Since the defendant was engaged in a business which was the subject of state control, and the cause of action arose out of such business, he could be subjected to service of process under the Mississippi statute.

It is obvious that each of the three cases discussed immediately above was influenced strongly by the concept which existed prior to *International Shoe* that jurisdiction and physical power are synonymous. However, this approach was finally discredited in *Davis-Wood Lumber Co., Inc. v. Ladner*.³⁰ There the plaintiff, a resident of Mississippi, brought an action to recover for work done under a contract with the defendant, a nonresident of this State. The Mississippi Supreme Court was of the opinion that the facts in the case warranted the conclusion that the defendant was doing business in this state; however, the important aspect of the decision is that the court did away with the fictions of consent (implied or express) and presence and adopted the more modern "minimal contacts" theory as the proper test for determining when jurisdiction could be asserted under Mississippi's long arm statute. The court frankly stated that it was of the opinion that a state ought to have the power to require a person conducting business activi-

²⁹205 Miss. 306, 38 So. 2d 752 (1949).

³⁰210 Miss. 863, 50 So. 2d 615 (1951).

ties within its boundaries to be answerable in the courts of that state for claims arising out of the business activities in question. The court emphasized that no uniform test could be applied to all situations and that each case should be given individual consideration. Summarizing the court's opinion, it appears that the rule established in this case is: Jurisdiction may be asserted over a nonresident defendant not physically present within the forum when such nonresident has some minimum contact with the forum and the assertion of jurisdiction will not offend the traditional notions of fair play and substantial justice.³¹ It is readily apparent that this decision marked the beginning of a broadening of the scope of in personam jurisdiction over nonresidents in Mississippi.

In *Mississippi Wood Preserving Co. v. Rothschild*³² the Fifth Circuit Court of Appeals further refined the test announced by the Mississippi Supreme Court in the *Davis-Wood* case by holding that isolated activity on the part of a nonresident was insufficient to constitute doing business under the provisions of section 1437. The court stated that although the literal wording of the statute was sufficiently broad to include a single transaction, under *Davis-Wood* it was abundantly clear that a series of acts or transactions, continuous in nature, was necessary before a nonresident defendant could be found to be doing business in this State.

*Jarrard Motors, Inc. v. Jackson Auto & Supply Co.*³³ involved a suit instituted by a local automobile dealer against the nonresident distributor from whom it secured its automobiles. The plaintiff sought to recover damages for breach of a dealership agreement previously entered into by the parties. Holding that the defendant was doing business in this state, the supreme court emphasized the fact that under the contract in question the defendant-distributor possessed almost complete control over the method and manner in which the local dealer did business. The court further noted that the defendant had failed to file its distributor-dealership contract with the Secretary of State as required by Mississippi law.³⁴

In *Livestock Services, Inc. v. American Cyanamid Co.*³⁵ suit was instituted by a Mississippi corporation against a foreign corporation for

³¹This test simply applies the basic requirement of the due process requirement announced by the United States Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

³²201 F.2d 233 (5th Cir. 1953).

³³237 Miss. 660, 115 So. 2d 309 (1959).

³⁴Miss. CODE ANN. §§ 8072, 8073 (1956).

³⁵244 Miss. 531, 142 So. 2d 210 (1962).

breach of warranty on a vaccine manufactured by the nonresident defendant. The Mississippi Supreme Court declined to find defendant to be doing business, although it had some ten salesmen working in this state on a regular basis. The court emphasized the fact that none of the defendant's employees working within this state had authority to receive or accept orders on behalf of the defendant. This opinion illustrates the tendency of the Mississippi Supreme Court to follow its earlier decisions rather than the more liberal trend established by the United States Supreme Court,³⁶ since it appears that the defendant's contacts with the forum were more than "minimal." This case appears to be an anomaly since in rendering its opinion, the court failed to rely upon any of its prior major decisions and based its decision on a relatively obscure case.³⁷

In *Century Brick Corp. of America v. Carroll*³⁸ a Mississippi franchise dealer brought an action against a foreign corporation, seeking to have the franchise adjudicated a nullity and to recover money paid to the defendant for such franchise. Service of process was effectuated under section 1437, and the defendant appeared specially to contest jurisdiction. The Mississippi Supreme Court noted that the defendant had sent its representatives into the state to solicit local dealers' applications for franchises and had exercised a large degree of control over local dealers once franchises were granted. Considering these facts and relying primarily on *Jarrard Motors, Inc. v. Jackson Auto & Supply Co.*,³⁹ the court found that Century was doing business in this state. The continuity test was met by a finding that Century's representatives' activities within this state were more than isolated acts and, in fact, had been continuous and systematic. The court placed heavy emphasis upon the fact that Century had retained substantial control over the manner in which local franchise owners operated their businesses. The court was of the opinion that these circumstances satisfied the minimal contact requirement and that maintenance of the suit did not offend "traditional notions of fair play and substantial justice."⁴⁰

In *Hazell Machine Co. v. Shahan*⁴¹ suit was instituted by a Mississippi resident against a foreign corporation to recover a balance due on an open account and for breach of an oral contract previously entered into by the parties. Under the terms of the contract in question, Shahan

³⁶See *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964).

³⁷*Snipes v. Commercial & Industrial Bank*, 225 Miss. 345, 83 So. 2d 179 (1955).

³⁸247 Miss. 514, 153 So. 2d 683 (1963).

³⁹237 Miss. 660, 115 So. 2d 309 (1959).

⁴⁰247 Miss. at 521, 153 So. 2d at 688.

⁴¹249 Miss. 301, 161 So. 2d 618 (1964).

was to serve as a local distributor of rebuilt motors for the defendant. Both parties were to work together in the promotion of the defendant's product in Mississippi. In furtherance of this contract, an agent of the defendant secured office space for the plaintiff and aided the plaintiff in securing the financing necessary to open his business. The supreme court found that the nonresident was doing business in this state and that the defendant had entered a general appearance by filing an answer in this cause, thereby waiving its right to question jurisdiction.

In *Walker v. Savell*⁴² the Fifth Circuit Court of Appeals was again called on to review section 1437 and to interpret the manner in which it had been construed by the Mississippi Supreme Court. The suit arose as a result of an article written by Savell, a Mississippi resident, and distributed by the Associated Press to its various members. The facts showed that the activities of the defendant in Mississippi were no more and, in fact, probably less than the publisher of the *Commercial Appeal* in the *Lee* case.⁴³ Reviewing the state court decisions, the court found that neither the *International Shoe*⁴⁴ case, its successors,⁴⁵ nor subsequent decisions of the Mississippi Supreme Court⁴⁶ had relaxed the requirements for doing business and that the activities of the Associated Press were probably less than those of the publisher of the *Commercial Appeal*. In fact, the court noted that perhaps the strictness of the doctrine came from a recognition of the threat a contrary ruling would pose to freedom of the press, though the court did point out with candor that such was not mentioned in the opinion. One can only conclude that *Lee*⁴⁷ is still good law at least insofar as concerns activities of the press.

*Mladinich v. Kohn*⁴⁸ must now be considered the leading case in determining whether a nonresident is doing business in Mississippi. Kohn, a nonresident, was sued for slander, alleged to have been committed in a speech delivered in Mississippi before a religious association and for which Kohn received no remuneration. The court held that Kohn was not doing business, nor did he perform any character of work or service in this state under the statute. The court held that three basic factors must coincide for the state courts to have jurisdiction:

⁴²335 F.2d 536 (5th Cir. 1964).

⁴³195 Miss. 264, 14 So. 2d 351 (1943).

⁴⁴326 U.S. 310 (1945).

⁴⁵See, e.g., *Travelers Health Assoc. v. Virginia*, 339 U.S. 643 (1950).

⁴⁶See, e.g., *Davis-Wood Lumber Co. v. Ladner*, 210 Miss. 863, 50 So. 2d 615 (1951).

⁴⁷195 Miss. 264, 14 So. 2d 351 (1943).

⁴⁸250 Miss. 138, 164 So. 2d 785 (1964).

1. The nonresident must purposefully do some act or consummate some transaction in this state.
2. The cause of action must arise from or be connected with such act or transaction.
3. Jurisdiction must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity, the relative convenience of the parties, the benefits and protection of the laws of the state and the basic equities of the situation.

Adopting this new definition of what constituted doing business, the court found that the activities of Kohn did not meet the minimal contacts requirement of part three, because his speech was an isolated act and as such was not a sufficient minimal contact to give jurisdiction to the state court.

The court also had before it the question of whether the defendant, by making a special appearance in the Mississippi courts and filing a motion to dismiss for lack of jurisdiction, had made a general appearance under the statute⁴⁹ with the resulting waiver of the right to raise the question of jurisdiction. Read literally, the statute indicates that any motion to quash process constitutes a general appearance, and *York v. Texas*⁵⁰ held constitutional a Texas statute which denied a nonresident the right to make a special appearance in the Texas courts to contest the state courts' jurisdiction. Distinguishing those decisions the court found not to be in point, (either because the defendant had voluntarily entered an appearance or was doing business in the state)⁵¹ and modifying and overruling other cases⁵² to the extent that they were not distinguishable on facts and issues, the court held that a nonresident defendant could make a special appearance in the courts of Mississippi to raise the issue of whether the state court had jurisdiction without subjecting himself to its jurisdiction. Thus, a special appearance may be made by a motion to dismiss or any other pleading specifically raising this issue before a general appearance is made, and any such motion to the jurisdiction should be heard and determined before any other pleading is filed by the defendant.

⁴⁹MISS. CODE ANN. § 1881 (1956).

⁵⁰137 U.S. 15 (1890).

⁵¹*E.g.*, *Arndt v. Turner*, 230 Miss. 294, 92 So. 2d 875 (1957).

⁵²*Gridley, Maxon and Co. v. Turner*, 179 Miss. 890, 176 Miss. 733, 177 So. 362 (1937); *Standard Oil Co. of Ky. v. State*, 107 Miss. 377, 65 So. 468 (1914).

This landmark decision had two significant effects: (1) it laid down a new test in Mississippi for determining what constituted doing business, and (2) it made clear that a nonresident could make a special appearance to test the jurisdiction of the state courts without making a general appearance. Obviously, *Mladinich* liberalized the doing business concept, and its rule was a far cry from the old fictions of presence and consent. Nevertheless, the minimal contacts still had to be more than one might think from a literal interpretation of the word "minimal" and certainly more than had been found sufficient twenty years earlier by the United States Supreme Court.

II. THE AMENDED LONG ARM STATUTE

In 1964, obviously prompted by the decision rendered in *McGee v. International Life Insurance Co.*⁵³ and following the lead taken by other states,⁵⁴ the Mississippi legislature amended the terms of section 1437 of the Mississippi Code so as to broaden its scope⁵⁵ and enlarge the jurisdiction of the courts of this state over nonresident defendants.⁵⁶ The provisions of the amended statute now read in part as follows:

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this State as to doing business herein, who shall make a contract with a resident of this State to be performed in whole or in part by any party in this State, or who shall commit a tort in whole or in part in this State against a resident of this State, or who shall do any business or perform any character of work or service in this State, shall by such act or acts be deemed to be doing business in Mississippi. . . .⁵⁷

As previously discussed, prior to the 1964 amendment jurisdiction over nonresident defendants could be asserted only if the nonresident conducted business activities within this state of a sufficient nature to be classified as "doing business" here. As is readily apparent from the decisions rendered under the original statute, a rather substantial and continuous amount of activity was necessary in order to bring one within the ambit of the term "doing business." While the original

⁵³355 U.S. 220 (1957).

⁵⁴See *Dahlberg Co. v. Western Hearing Aid Center*, 259 Minn. 330, 107 N.W.2d 381, 384 (1961). For a complete discussion of the development of the single act statutes, see Annot., 23 A.L.R.3d 551 (1969) (single contract statutes) and Annot., 24 A.L.R.3d 532 (1969) (single tort statutes).

⁵⁵*Mladinich v. Kohn*, 186 So. 2d 481, 482 (Miss. 1966).

⁵⁶*Smith v. Temco*, 252 So. 2d 212, 215 (Miss. 1971).

⁵⁷MISS. CODE ANN. § 1437 (Supp. 1971).

statute was clearly a step in the right direction, its application left much to be desired since residents had no practical recourse against the transient wrongdoer whose activities within the state were insufficient to constitute "doing business" herein. This problem was squarely met by the legislature in the amended statute by also providing for the assertion of jurisdiction, within certain limitations, over nonresidents whose sole contact with this state is the commission of a single tort or the execution of a single contract. Thus, under the terms of the amended long arm statute there are now three distinct categories of nonresidents who are subject to service of process:

1. Those who have executed a contract with a resident of Mississippi to be performed in whole or in part within this state;
2. Those who have committed a tort, in whole or in part, in Mississippi against a resident of this state; and
3. Those who perform any nature of work or services in this state.⁵⁸

The statute further provides that when the nonresident defendant's activities are sufficient to place him in one or more of the three categories set out above, he is deemed to be "doing business" in this state, and his act or acts are deemed equivalent to the appointment of the Secretary of State of Mississippi as his agent for service of process. Service upon the Secretary of State has the same legal effect as if such nonresident had been personally served with process at his principal place of business, according to the laws in effect at such location.⁵⁹

It should be noted that the statute may be used to assert jurisdiction over nonresidents only.⁶⁰ Conversely, only residents of this state may utilize the statute to secure jurisdiction over a nonresident.⁶¹ Foreign corporations properly qualified to do business in Mississippi are treated as residents for purposes of the statute.⁶²

A word of caution is in order. Although the terms of the Mississippi long arm statute are extremely broad, it must be recognized that its

⁵⁸C. H. Leavell & Co. v. Doster, 211 So. 2d 813, 814 (Miss. 1968).

⁵⁹Miss. CODE ANN. § 1437 (Supp. 1971).

⁶⁰Hyde Constr. Co. v. Koehring Co., 321 F. Supp. 1193, 1201 (S.D. Miss. 1969).

⁶¹C. H. Leavell & Co. v. Doster, 211 So. 2d at 814 (Miss. 1968). Compare *Ewing v. Lockheed Aircraft Corp.*, 202 F. Supp. 216, 219 (Minn. 1962), wherein it was held that the Minnesota Long Arm Statute, MINN. STAT. ANN. § 313.13, subd. 1 (3) (1961) could be utilized by residents and nonresidents alike.

⁶²C. H. Leavell & Co. v. Doster, 211 So. 2d at 814 (Miss. 1968).

reach is not completely unbridled, and because of constitutional considerations its application is limited. The statute specifically provides that even in instances when a nonresident has taken action within this state which will place him in one or more of the three categories defined therein, he may not be subjected to service of process unless the suit is one that arises out of or is connected with the specific act or acts which have placed him in the category in question. This portion of section 1437 provides:

Such act or acts shall be deemed equivalent to the appointment by such nonresident of the Secretary of State of the State of Mississippi, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served *in any actions or proceedings accrued or accruing from such act or acts, or arising from or growing out of such contract or tort, or as an incident thereto, by any such nonresident or his, their, or its agent, servant or employee. . . .*⁶³ (emphasis added.)

For example, A is a resident of Tennessee and does a large volume of business in Mississippi with B, a resident of Mississippi. A's business activities in Mississippi are sufficient to classify him as "doing business" here. A and B execute a contract in Tennessee which is completely unrelated to A's business activities in Mississippi, and no portion of this contract is to be performed in Mississippi. A then breaches his obligations under said contract and B institutes suit in Mississippi against A seeking to recover damages for breach of contract. B seeks to effectuate service of process under section 1437, alleging that A is subject to service of process by virtue of the fact that he is doing business here. A appears specially and moves to quash process. Although A is "doing business" in Mississippi, subjecting himself to service of process under section 1437 in any suit connected with or arising out of such business activities, he is not amenable to service of process under the statute in a suit which is unrelated to such business activities. Thus, if B wishes to pursue his cause of action against A, he will be forced to seek recourse in the courts of Tennessee.⁶⁴

The inclusion of this requirement in section 1437 was due in part to the decision of the United States Supreme Court in *Hanson v.*

⁶³MISS. CODE ANN. § 1437 (Supp. 1971).

⁶⁴See *Hyde Constr. Co. v. Koehring Co.*, 321 F. Supp. 1193, 1206 (S.D. Miss. 1969); *Easterling v. Volkswagen of America, Inc.*, 308 F. Supp. 966, 981 (S.D. Miss. 1969); *Collins v. Truck Equipment Sales, Inc.*, 231 So. 2d 187, 188 (Miss. 1970). See also, Note, *Jurisdiction Over Nonresident Corporations Based on A Single Act; A New Sole For International Shoe*, 47 GEO. L.J. 342, 354 (1958) [hereinafter cited as *A New Sole For International Shoe*].

Denckla,⁶⁵ which held that when assertion of jurisdiction over a non-resident is based on activity of the nonresident within the forum state, the cause of action must be one which arises out of the activity in question.⁶⁶ In an extremely well written article dealing with this topic, one writer has commented on the necessity of the rule as follows:

The omission of this rule would be a violation of the reasonableness which American jurisprudence has always demanded of due process. The right of a state to protect its citizens from the operations of nonresidents is a natural but not an unlimited one. . . .⁶⁷

With this restriction firmly in mind, a review of each of the three categories of nonresidents who are subject to service of process under section 1437 is now in order.

A. The Single Contract Provision

The first category of nonresidents subject to service of process under the terms of Mississippi's long arm statute is those ". . . who shall make a contract with a resident of this State to be performed in whole or in part by any party in this State. . . ."⁶⁸ For convenience this statutory category will hereinafter be referred to simply as the "single contract" provision.

Assertion of jurisdiction based upon the performance of a single contract is clearly a departure from traditional notions held by the courts of this state as to the minimum contacts which were necessary in order to satisfy due process requirements under the decision of *International Shoe Co. v. Washington*.⁶⁹ Prior to the 1964 amendment to section 1437, the Mississippi court had pronounced that a single isolated act was not sufficient contact with this state for assertion of jurisdiction⁷⁰ and had, in fact, required a substantial and continuous amount of activity within the state before it would subject a nonresident to trial

⁶⁵357 U.S. 235 (1958).

⁶⁶*Id.* at 251. Cf. *Simon v. Southern Ry.*, 236 U.S. 115, 130 (1915); *Old Wayne Mut. Life Ass'n. v. McDonough*, 204 U.S. 8, 22-23 (1907).

⁶⁷Note, *A New Sole For International Shoe*, *supra* note 64, at 354.

⁶⁸MISS. CODE ANN. § 1437 (Supp. 1971).

⁶⁹326 U.S. 310 (1945).

⁷⁰*See Mladinich v. Kohn*, 250 Miss. 138, 164 So. 2d 785, 790 (1964). *But see*, Comment, *In Personam Jurisdiction Over Nonresidents*, *supra* note 13, at 102, which noted the possibility that § 1437, prior to its amendment in 1964, was broad enough for assertion of jurisdiction based on a single transaction.

here against his wishes.⁷¹ The fact that the single contract provision of section 1437 has gone virtually unnoticed since its addition in 1964⁷² is difficult to understand, but it may represent a reluctance on the part of the bench and bar to change their convictions in this regard.

In any event, although Mississippi courts have been hesitant to assert jurisdiction on the basis of the performance of a single contract, it is obvious under the decision of *McGee v. International Life Insurance Co.*⁷³ that such action does not violate federal constitutional guarantees of due process. In *McGee* the Supreme Court upheld a California statute⁷⁴ which permitted service of process over nonresident insurance companies in suits arising out of insurance policies solicited by the company through the mail. It would appear that the defendant insurance company's contacts with the forum were at the barest of minimums in *McGee*, since the company had never transacted any business in California other than solicitation and delivery by mail of the policy which was the subject of the controversy. Upholding jurisdiction, Mr. Justice Black commented:

Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part, this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

Turning to this case we think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. . . .⁷⁵

⁷¹See, e.g., *Livestock Services, Inc. v. American Cyanamid Co.*, 244 Miss. 531, 142 So. 2d 210 (1962); *J. R. Watkins Co. v. Flynt*, 220 Miss. 871, 72 So. 2d 195 (1954); *Lee v. Memphis Publishing Co.*, 195 Miss. 264, 14 So. 2d 351 (1943); *North American Mortgage Co. v. Hudson*, 176 Miss. 266, 168 So. 79 (1936).

⁷²See *C. H. Leavell & Co. v. Doster*, 211 So. 2d 813 (Miss. 1968), wherein jurisdiction was apparently asserted over a foreign corporation at least partially on the basis of its performance of a single contract within this state.

⁷³355 U.S. 220 (1957).

⁷⁴CALIF. INS. CODE §§ 1610-20 (West 1955).

⁷⁵335 U.S. at 222, 223. See also, *Deveny v. Rheem Mfg. Co.*, 319 F.2d 124 (2d Cir. 1963), wherein the court stated that:

In many instances constitutional problems connected with assertion of jurisdiction on this basis are minimized by the physical presence of the nonresident within the forum state in the performance of his obligations under the contract in question.

In fact, performance of the contract upon which jurisdiction is to be asserted will often guarantee a sufficient amount of activity within the state so that the defendant may be considered to be "doing business" therein under the third category of section 1437, thus providing a dual basis upon which jurisdiction may be predicated. In *C. H. Leavell & Co. v. Doster*⁷⁶ suit was instituted by two nonresident corporations qualified to do business in Mississippi against a third corporation which was not qualified to do business here. The suit arose out of a contract entered into by the parties and performed by the defendant within the state. The court sustained jurisdiction under the single contract provision of section 1437 but further held that by having performed work and services under the contract in question, the defendant was also subject to the jurisdiction of the courts of Mississippi under the third category.⁷⁷

In order to properly understand the single contract provision and its operation, it is necessary to briefly review the terminology used therein. In view of the limited application which this portion of the statute has received in Mississippi, recourse must be had to decisions from other states with similar statutes. However, it is not the purpose of this discussion to present an in depth review of decisions from other states whose long arm statutes contain a single contract provision similar to that found in section 1437.⁷⁸ Other cases are discussed solely to illustrate what is possible under a single contract provision such as that found in the Mississippi long arm statute.

Naturally the first question which arises in analyzing this portion of section 1437 is the meaning of the word "contract" as used therein.

It is impossible to imagine a case arising from a contract made by a foreign corporation "with a resident of Vermont to be performed in whole or in part by either party in Vermont" where contacts with Vermont would not suffice to sustain jurisdiction. The statute merely characterizes the extent of contacts with the forum state actually present in McGee. While Hanson affirms the necessity of a defendant's having such "minimal contacts" with the forum state, that case in no sense can be taken as increasing the requirements which the Court found to be satisfied in McGee. *Id.* at 128.

⁷⁶211 So. 2d 813 (Miss. 1968).

⁷⁷*Id.* at 815.

⁷⁸See Annot., 23 A.L.R.2d 551 (1969) for a comprehensive review of the single contract provisions of long arm statutes from other jurisdictions.

Obviously written contracts come within the meaning of the term.⁷⁹ Although the question has not been resolved in this state, courts in other jurisdictions have also held that oral contracts come within the statutory meaning. In *Bonhiver v. Louisiana Brokers Exchange, Inc.*,⁸⁰ and in *United Barge Co. v. Logan Charter Service, Inc.*,⁸¹ service of process over nonresidents was upheld under the single contract provision of the Minnesota long arm statute⁸² based on the performance of an oral contract. In *State v. Knapp*⁸³ the Supreme Court of West Virginia indicated that jurisdiction under the single contract provision of the West Virginia long arm statute⁸⁴ on the basis of an oral contract which supplemented an earlier written contract was proper. Inclusion of an oral agreement within the term "contract" would seem to be logical since both written and oral contracts are express in nature.⁸⁵ The ultimate question is whether the statutory term "contract" is broad enough to include implied contracts. Unfortunately no case has been found which specifically reaches this question, although it seems probable that it will arise in the future.

The next consideration in defining the probable reach of this portion of section 1437 is to determine the significance of the fact that the statute provides for assertion of jurisdiction when the contract is performed "in whole or in part by any party within this State." The utilization of this terminology is thought by many to represent the ultimate expansion of the reach of a single contract provision of a long arm statute. This terminology was the subject of comment in *Midwest Packaging Corp. v. Oerlikon Plastics, Ltd.*,⁸⁶ wherein the single contract provision of the Iowa long arm statute⁸⁷ was construed:

The kinds of contractual activities giving rise to causes of action over which jurisdiction is asserted over nonresident defendants vary from state to state. Although a state need not provide its courts with jurisdiction over every action which constitutionally could be brought in the state . . . statutes which define the requisite activity for jurisdiction as a contract with a resident "to be performed in whole or in part by either party" within the state . . . are among the most liberal. . . .⁸⁸

⁷⁹1 A. CORBIN, CONTRACTS § 3 (1963).

⁸⁰255 F. Supp. 254 (Minn. 1966).

⁸¹237 F. Supp. 624 (Minn. 1964).

⁸²MINN. STAT. ANN. § 303.13, subd. 1 (3) (1961).

⁸³147 W.Va. 704, 131 S.E.2d 81 (1963).

⁸⁴W.VA. CODE, Chap. 31, Art. 1, § 71 (1961).

⁸⁵1 A. CORBIN, CONTRACTS § 18 (1963).

⁸⁶279 F. Supp. 816 (S.D. Iowa 1968).

⁸⁷IOWA CODE § 617.3 (1971).

⁸⁸279 F. Supp. at 818.

There would seem to be little, if any, problem in determining when a contract is performed "in whole" within a state, since this term is somewhat self-explanatory. However, it is more difficult to determine exactly what the statute means when it refers to contracts performed "in part" in Mississippi. Naturally a contract is performed "in part" within a state when some portion of the activity contemplated by the terms thereof takes place within the forum state. However, the key question is the amount of activity which must take place within the forum before jurisdiction can properly be asserted consonant with requirements of due process. Certainly when the nonresident's activity within the forum in performing the contract under consideration is equal to or in excess of that found in *McGee*, the basic requirements of due process have been met. As will be recalled, in *McGee* the only activity of the defendant in the forum was the use of the mails in connection with the solicitation and issuance of a policy of insurance. However, although individual states must remain within the liberal boundaries set by *McGee*, they are in no wise obliged to exercise jurisdiction to the fullest possible extent.⁸⁹ It is submitted that the problem of the degree of performance which must take place within a state before the minimum contacts requirement has been satisfied is one for which no hard and fast rule can be devised. As in other cases decided under section 1437, the decision of whether or not jurisdiction can properly be asserted on this basis should turn on the facts which exist in each particular case.⁹⁰ Since no ready answer is available for this problem, a review of the extent to which other states have seen fit to exercise jurisdiction based on the partial performance of a contract within the forum is in order. For purposes of this discussion, cases decided under the Minnesota long arm statute⁹¹ have been utilized primarily because that statute is similar to section 1437 and has received a liberal construction,⁹² thus providing an indication of the outer limits of a statute of this nature.

In *Lundell v. Massey-Ferguson Services N.V.*,⁹³ suit was instituted by Lundell, a citizen of Iowa, against the defendant, a foreign corpora-

⁸⁹See *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964); 1 W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 179 (Wright ed. Supp. 1968).

⁹⁰*Cf. Republic-Transcon Indus., Inc. v. Templeton*, 253 Miss. 132, 175 So. 2d 185 (1965).

⁹¹MINN. STAT. ANN. § 303.13, subd. 1 (3) (1961).

⁹²*Guardian Packaging Corp. v. Kapak Indus., Inc.*, 316 F. Supp. 952, 954 (Minn. 1970); *Haldeman-Homme Mfg. Co. v. Texacon Indus., Inc.*, 236 F. Supp. 99, 101 (Minn. 1964).

⁹³277 F. Supp. 940 (N.D. Iowa 1967).

tion not qualified to do business in Iowa, to recover the balance due under a written installment contract whereby the plaintiff sold to defendant all of his interest in certain inventions of and patent rights to hay and forage watering machines. Service of process was attempted under the single contract provision of the Iowa long arm statute, which provides for assertion of jurisdiction over nonresident corporations not qualified to do business in Iowa in part as follows:

"If a foreign corporation makes a contract with a resident of Iowa to be performed in whole or in part by either party in Iowa . . . such act shall be deemed to be doing business in Iowa . . . for the purposes of service of process . . . on such foreign corporation under this section. . . ."⁹⁴

Upholding jurisdiction, the court noted that the contract called for payments of installments by the defendant to the plaintiff in Iowa, that two such payments had been made in this manner, and that the employees of the defendant had called on the plaintiff on at least three occasions for consultation as to the technical aspects of the invention in question. The court commented:

It is this court's opinion that if faced with the facts of this case, the Iowa Supreme Court, in view of its liberal attitude concerning jurisdiction of foreign corporations as expressed in *Tice v. Wilmington Chem. Corp.*, 141 N.W.2d 616 (Iowa 1966), would hold Sec. 617.3 applicable.

Determination of what minimum contacts due process requires is a question of federal law. . . . In a contact action, the due process objection is overcome if the contract has a substantial connection with the state claiming jurisdiction. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). See also *Hanson v. Denckla*, 357 U.S. 235, 251-52, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

It is this court's view that the contracts noted above provide a substantial connection with the state of Iowa, and therefore defendant's Motion to Dismiss is not well taken.⁹⁵

In *Kornfuehrer v. Philadelphia Bindery, Inc.*⁹⁶ suit was instituted by a resident of Minnesota against a Pennsylvania corporation not qualified to do business in the state when the latter failed to comply with the terms of a sales agreement entered into by the parties. Service of process had been effectuated pursuant to the Minnesota long arm statute,⁹⁷ and the defendant promptly moved to quash. The decision ren-

⁹⁴IOWA CODE § 617.3 (1971).

⁹⁵277 F. Supp. at 941, 942.

⁹⁶240 F. Supp. 157 (Minn. 1965).

⁹⁷MINN. STAT. § 303.13, subd. 1(3) (1961).

dered by the court reveals that the contract in question had been negotiated and consummated primarily by means of the mail. The product to be sold under said contract was manufactured by the defendant outside the state of Minnesota and under the terms of the agreement was to be shipped to the buyer from Philadelphia f.o.b. Acceptance of and payment for said goods was to take place in Minnesota. Apparently the only contact which the defendant had with the state of Minnesota was the fact that it had entered into a contract by mail to sell goods to a resident of Minnesota. Holding that the assertion of jurisdiction was proper, the court noted the similarities between the facts in the case then before it and in *McGee*, i.e., deliverance of the contract within the forum by the defendant (thus indicating that the nonresident was aware of the fact that it was transacting business therein), payments to the nonresident mailed from within the forum, and residence of the plaintiff within the forum at the time the contract was breached. The court was of the opinion that, as in *McGee*, these factors provided a sufficient contact with the forum. The opinion states:

The legal issues in *McGee* were so similar to those raised here that a close examination of the factors which the Court thought gave the contract a substantial connection with California seems appropriate. There are only three.

1. The contract was delivered in the forum State. . . .
 2. Payment was made from the forum State. . . .
 3. The plaintiff was a resident of the forum State at the time the contract was breached. . . .
-

Thus, this Court has concluded that the fact that the Bindery had entered a contract with a Minnesota resident to supply the resident with its product in the normal course of its profit-making activities was sufficient contact with Minnesota to allow the State to exercise personal jurisdiction for causes of action arising out of the contract. . . .⁹⁸

In *Washington Scientific Industries, Inc. v. American Safeguard Corp.*,⁹⁹ the plaintiff, a Minnesota corporation, had entered into a contract with the defendant, a nonresident corporation not qualified to do business in Minnesota, whereby the latter corporation was to act as the exclusive sales representative of the former in an area outside Minnesota. Difficulties arose between the plaintiff and the defendant over commissions due under the terms of this contract, and a declaratory judgment action was instituted by the plaintiff in federal district court of Minne-

⁹⁸240 F. Supp. at 160-61.

⁹⁹308 F. Supp. 736 (Minn. 1970).

sota. Service of process was effectuated over the corporate defendant pursuant to the single contract provision of the Minnesota long arm statute,¹⁰⁰ and since the defendant's contacts with the forum state were relatively minimal, a motion to dismiss for lack of jurisdiction was made. Overruling the motion, the court noted the following factors as evidence of partial performance of the contract within Minnesota: The president of the defendant corporation had originally traveled to Minnesota in order to solicit the plaintiff to enter into the contract in question, and thereafter he had returned to Minnesota on two occasions for training sessions. All checks payable to the defendant for services rendered were to be issued by the plaintiff in Minnesota; all directives, correspondence and shipment of materials would originate with the plaintiff in that state. The court commented as follows on these activities:

The court is quite clear that this is sufficient contact with the State of Minnesota to enable the plaintiff to invoke jurisdiction through the long-arm statute. Obviously at least plaintiff's portion of the contract would be performed within Minnesota not only in writing checks in payment of defendant's services, but in addition issuing directions, carrying on correspondence, making shipments, etc. Jurisdiction under this long-arm statute has been maintained in cases where the activity within Minnesota is not greater than here. *Hagberg v. Colonial & Pacific Frigidways, Inc.*, 279 Minn. 396, 157 N.W.2d 33 (1968); *Dahlberg Co. v. Western Hearing Aid Center*, 259 Minn. 330, 107 N.W.2d 381, cert. denied, 366 U.S. 961, 81 S.Ct. 1921, 6 L.Ed.2d 1253 (1961). See *Washington Scientific Indus., Inc. v. Polan Indus., Inc.*, 273 F. Supp. 344 (D. Minn. 1967).¹⁰¹

In *Dahlberg Co. v. Western Hearing Aid Center*¹⁰² suit was instituted in state court of Minnesota by the plaintiff, a Minnesota corporation, against three inter-related Oregon corporations not qualified to do business in Minnesota to recover on certain promissory notes executed by the defendants in favor of the plaintiff and on an open account maintained by one of the defendants. The plaintiff was a manufacturer of hearing aids, which were distributed outside the state by the defendants pursuant to a written contract between the parties. Service of process was made on defendants under the Minnesota long arm statute,¹⁰³ and defendants' motion to quash was dismissed. On appeal to the Supreme Court of Minnesota, jurisdiction was upheld based upon the following activities performed in furtherance of the distributors' contract

¹⁰⁰MINN. STAT. ANN. § 303.13, subd. 1 (3) (1961).

¹⁰¹308 F. Supp. at 738.

¹⁰²259 Minn. 330, 107 N.W.2d 381 (1961).

¹⁰³MINN. STAT. ANN. § 303.13, subd. 1 (3) (1961).

between the parties: The original distributorship agreement was executed in Minnesota as were the promissory notes which were the subject of the lawsuit; goods were shipped by the plaintiff from Minneapolis f.o.b. to the defendant; the president of the defendant corporation attended sales meetings held by the plaintiff in Minnesota; the defendant furnished the plaintiffs with sales reports, lists of customers, receipts of payments for products sold, etc., which were mailed to Minnesota.

In view of the fact that the single contract provision of Mississippi's long arm statute¹⁰⁴ is equally as broad as that of Minnesota,¹⁰⁵ it is obvious that the provision has great potential. Whether our court will choose to give a broad interpretation to the single contract provision of the Mississippi statute is a question which remains to be answered. However, in view of the attitude taken by the Mississippi Supreme Court with reference to the single tort provision of section 1437, it would appear that a more liberal attitude may be developing toward full utilization of the statute.¹⁰⁶

The final aspect of this portion of the statute which must be considered is the fact that the legislature has apparently provided for assertion of jurisdiction on the basis of a single contract between a resident and a nonresident when no overt action is taken by the nonresident within the forum. Although section 1437 provides that the nonresident must have executed with a resident, a contract to be performed at least in part within this state, the statute further provides that performance within the state may be "by any party." This wording appears to contemplate assertion of jurisdiction when a nonresident enters into a contract with a resident, but performance of the contract within the state is carried out solely by the resident. It is obvious that this provision creates a problem insofar as due process requirements are concerned, since the Supreme Court held in *Hanson v. Denckla* that "... unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state."¹⁰⁷

At first glance it appears that *McGee v. International Life Insurance Co.* provides a solution to this problem, since in that case jurisdiction was upheld even though the defendant was never physically present within the forum. However, this conclusion is unfounded, since

¹⁰⁴MISS. CODE ANN. § 1437 (Supp. 1971).

¹⁰⁵MINN. STAT. ANN. § 303.13, subd. 1 (3) (1961).

¹⁰⁶*Cf. Smith v. Temco*, 252 So. 2d 212 (Miss. 1971).

¹⁰⁷357 U.S. at 253.

it was apparently determined in that decision that the defendant acted within the forum by use of the mail to solicit the contract in question and to deliver the insurance contract to the resident.¹⁰⁸

Reviewing cases from other states with statutes construing a single contract provision similar to section 1437, no case in which jurisdiction was upheld when no portion of the contract was performed by the non-resident within the forum was found. However, even though the non-resident was never physically within the state, courts of other states have determined that there was performance within the forum by defendant based on his use of the mail, interstate telephone conversations, etc. Again, cases decided under the Minnesota long arm statute¹⁰⁹ have been utilized to provide an indication of the outer limits of a statute of this nature.

In *Haldeman-Homme Mfg. Co. v. Texacon Industries, Inc.*,¹¹⁰ suit was instituted in federal district court by Haldeman-Homme, a Minnesota corporation, against Texacon, a nonresident corporation not qualified to do business in Minnesota, for false representation and breach of contract. Service of process was attempted over Texacon under section 303.13, subd. 1 (3) (1961),¹¹¹ which provides for assertion of jurisdiction over nonresident corporations who have entered into “. . . a contract with a resident of Minnesota to be performed in whole or in part by either party in Minnesota. . . .” None of the defendant’s agents or employees had ever entered the state in negotiating the contract in question, nor had such nonresident corporation performed any portion of said contract within Minnesota. Texacon moved to quash process, urging that assumption of jurisdiction was unconstitutional under the rule laid down in *Hanson v. Denckla*,¹¹² which requires “. . . some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.”¹¹³ Texacon argued that since “. . . none of its agents . . . ever entered Minnesota . . . that there has never been any ‘act’ by which it invoked the protection of the laws of Minnesota.”¹¹⁴ Rejecting the position taken by Texacon, the court noted that the requirements of *Hanson v. Denckla* were satisfied by the fact that subse-

¹⁰⁸See Note, *A New Sole For International Shoe*, *supra* note 64, at 352. See also *Travelers Health Ass’n. v. Virginia*, 339 U.S. 643 (1950).

¹⁰⁹MINN. STAT. ANN. § 303.13, subd. 1 (3) (1961).

¹¹⁰236 F. Supp. 99 (Minn. 1964).

¹¹¹MINN. STAT. ANN. (1961).

¹¹²357 U.S. 235 (1958).

¹¹³236 F. Supp. at 101.

¹¹⁴*Id.*

quent to the consummation of the contract, Haldeman-Homme had executed a promissory note and chattel mortgage in Minnesota and forwarded these documents to the defendant in Texas, where they were accepted. Both of these documents would normally have been enforceable only in Minnesota since the maker of the note and the property subject to the chattel mortgage were found there. The court expressed the view that acceptance of these documents by the defendant was evidence of an act on the part of said defendant seeking the protection of the laws of Minnesota, thus satisfying the requirements of *Denckla*.

*Paulos v. Best Securities, Inc.*¹¹⁵ was a suit instituted by a Minnesota resident against a New York corporation not qualified to do business in Minnesota and certain of the officers and agents of said corporation to recover for the sale of securities by said defendants in violation of state law. The sales in question had originally been solicited by mail; none of the defendants had ever been physically present within the state; and all sales were consummated primarily by long distance telephone and to a lesser degree by use of the mail. Upholding jurisdiction over the nonresident corporation, the Supreme Court of Minnesota commented as follows on service of process under the single contract provision of the Minnesota long arm statute:¹¹⁶

4. Insofar as Best Securities is concerned, it may be said that under section 303.13, subd. 1 (3), above quoted, its actions as above described constituted "doing business" in Minnesota. This section provides that a foreign corporation shall be deemed as "doing business" here if it enters into a contract with a resident, which contract is to be performed in whole or in part within the state. *Obviously, the acts of Best Securities in promoting and consummating a series of stock sales to plaintiff in Minnesota, through repeated long distance telephone and mail communications, would fall within this definition. Certainly plaintiff's payments for such shares and their ultimate delivery to him were acts, some part of which at least were to be performed in Minnesota.* Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670; Schilling v. Roux Distributing Co., Inc., 240 Minn. 71, 59 N.W.2d 907. It would follow that under Section 303.13, subd. 1 (3), such actions were sufficient to give the Minnesota court jurisdiction of Best Securities as a foreign corporation doing business here.¹¹⁷ (Emphasis added.)

On the other hand, jurisdiction has been declined in a number of instances because performance within the forum was solely by a resident plaintiff.

¹¹⁵260 Minn. 382, 109 N.W.2d 576 (1961).

¹¹⁶MINN. STAT. ANN. § 303.13, subd. 1 (3) (1961).

¹¹⁷109 N.W.2d at 582.

As set out previously, the wording used in the single contract provision of section 1437 is extremely broad and, as indicated by decisions from other states, can serve as a very useful tool for acquiring jurisdiction over nonresidents whose activity within the forum is neither systematic nor continuous. Since the provision has gone virtually unnoticed thus far, the manner in which it will be applied by the Mississippi Supreme Court is yet to be determined. However, in view of the more liberal trend taken by the Mississippi courts in recent decisions, there can be little doubt that the provision will receive increased recognition in the near future.

B. *The Single Tort Provision*

The second category of nonresidents subject to service of process under the terms of Mississippi's present long arm statute includes those who ". . . shall commit a tort in whole or in part in this State against a resident of this State. . . ." ¹¹⁸ For convenience this portion of the statute will be referred to as the "single tort" provision.

The obvious reason for the inclusion of this provision in the 1964 amendment to section 1437 was to insure that residents of this state had a basis for assertion of jurisdiction over nonresidents whose tortious action caused injury here, but whose contacts with Mississippi were insufficient to constitute "doing business" within the meaning of what is now category number three of the statute. A graphic example of the gap filled by this provision can be found in the case of *Mladinich v. Kohn*, ¹¹⁹ which was decided shortly after the enactment of the 1964 amendment but prior to the date on which it took effect. ¹²⁰ In that case the defendant, a resident of Louisiana, entered this state and delivered a speech which allegedly slandered three Mississippi residents. However, he could not be subjected to suit here under the provisions of the old long arm statute since his single isolated foray into the state was insufficient to constitute "doing business" within the terms of the unamended provisions of the statute. ¹²¹ Thus, the plaintiffs were faced with the prospect of waiting until the defendant returned and could be personally served with process or following him to the state of his residence. The inequities of such a situation are apparent, since the

¹¹⁸MISS. CODE ANN. § 1437 (Supp. 1971).

¹¹⁹250 Miss. 138, 164 So. 2d 785 (1964).

¹²⁰It should be noted that in a later decision the Mississippi Supreme Court stated that it assumed that had the amended provisions of section 1437 been in effect on the date on which the alleged tort occurred that jurisdiction could properly have been asserted. *Mladinich v. Kohn*, 186 So. 2d at 482.

¹²¹164 So. 2d at 789-90.

cost of pursuing a transient tortfeasor to a forum where personal service can be effectuated will often prove to be prohibitive.¹²² With the addition of the single tort provision, another of the gaps which existed in Mississippi's long arm statute was filled, and the in personam jurisdiction of Mississippi courts over nonresidents was significantly broadened.

Since this portion of the statute was apparently designed to provide a basis for assertion of jurisdiction when the nonresident's contacts with the forum are at a bare minimum, close scrutiny must be given to constitutional considerations. As set out previously, constitutional limitations absolutely require that when jurisdiction is asserted under any long arm statute the defendant have certain minimal contacts with the forum state.¹²³ Traditionally our courts have required a significant amount of activity within the forum in order to satisfy this minimal contact requirement.¹²⁴ In fact, it is generally conceded that the Mississippi Supreme Court has interpreted the due process requirements of the United States Constitution in a much more conservative manner than the United States Supreme Court.¹²⁵ Thus, assertion of jurisdiction based upon the commission of a single tort is a radical departure from the traditional concept fostered by the Mississippi judiciary as to the minimum contacts necessary in order to satisfy requirements for due process. In a sense the enactment of legislation of this nature and the resulting liberalization of traditional concepts of constitutional theory necessary to accommodate such laws can be seen as a realistic attempt by the legislative and judicial branches of the government to meet the changing needs of a rapidly expanding society. Discussing the single tort provision of the Iowa long arm statute,¹²⁶ the supreme court of that state commented in this regard in the case of *Andersen v. National Presto Industries, Inc.*:¹²⁷

There has now been a further significant trend toward the liberalization of the laws pertaining to obtaining jurisdiction over foreign corporations, and we think our decision in the case at bar represents the more logical interpretation of our statute in the light of present day conditions. Modern means of transportation and communication have greatly altered conditions since the decision in *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed.

¹²²Cf. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

¹²³*International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

¹²⁴See, e.g., *Walker v. Savell*, 335 F.2d 536, 543 (5th Cir. 1964).

¹²⁵See *Dawkins v. White Prod. Corp.*, 443 F.2d 589, 591 (5th Cir. 1971); *Smith v. Barker*, 306 F. Supp. 1173, 1175 (N.D. Miss. 1968); *Walker v. Savell*, 335 F.2d 536, 543 (5th Cir. 1964).

¹²⁶IOWA CODE § 617.3 (1962).

¹²⁷257 Iowa 911, 135 N.W.2d 639 (1965).

565, and the power of a state to assert its jurisdiction over non-residents has been greatly expanded. It is an example of the capacity of the law to grow and change with changing conditions. . . .¹²⁸

In *Coulter v. Sears, Roebuck & Co.*,¹²⁹ the Fifth Circuit Court of Appeals noted:

The reservoir of state jurisdictional power over nonresidents has swollen tremendously in recent years. The receding boundaries of due process reflect the fundamental change in the national economy since the days of *Pennoyer v. Neff*.¹³⁰

Although the United States Supreme Court has yet to rule upon the constitutionality of assertion of jurisdiction based upon the commission of a single tort, the fact that *McGee v. International Life Insurance Co.*¹³¹ cites with approval the case of *Smyth v. Twin State Improvement Co.*¹³² (wherein the assertion of jurisdiction on this basis had been upheld by the Supreme Court of Vermont) may serve as an indication of the manner in which this question will eventually be answered.¹³³ There does seem to be a trend of judicial thought, at least in decisions rendered by the Fifth Circuit Court of Appeals, that the commission of a single tort by a nonresident within a state provides a sufficient contact between the nonresident and the forum to allow assertion of jurisdiction without an infringement of due process.¹³⁴ In *Eyerly Aircraft Co. v. Killian*¹³⁵ the court expressed its sentiments in this regard as follows:

[W]here a nonresident corporation engages in a single isolated transaction in a state and a tort claim arises out of that activity, the state may assert jurisdiction over the nonresident corporation without contravening due process. . . .¹³⁶

When the tort upon which jurisdiction is based is committed "in whole" within the forum (i.e., when the tortious act itself occurs within

¹²⁸*Id.* at 642.

¹²⁹426 F.2d 1315 (5th Cir. 1970).

¹³⁰*Id.* at 1316, 1317.

¹³¹355 U.S. 220, 223 (1957).

¹³²116 Vt. 569, 80 A.2d 664 (1951).

¹³³See also the opinions of Justice Goldberg, acting as a single Judge in *Rosenblatt v. American Cyanamid Co.*, 86 S.Ct. 1 (1965).

¹³⁴*Dawkins v. White Prod. Corp.*, 443 F.2d 589 (5th Cir. 1971); *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591 (5th Cir. 1969); *Elkhart Eng'r. Corp. v. Dornier Werke*, 343 F.2d 861 (5th Cir. 1965).

¹³⁵414 F.2d 591 (5th Cir. 1969).

¹³⁶*Id.* at 597.

the forum)¹³⁷ there would seem to be a lesser problem from the constitutional standpoint, since the defendant will have taken overt action within the forum as required by *Hanson v. Denckla*.¹³⁸ However, there is a growing trend to assert jurisdiction in products liability cases when the defendant is never physically present within the forum but manufactures a product which causes injury therein on the theory that a tort occurs in part wherever the product in question causes injury.¹³⁹ Although the nonresident manufacturer has no direct contact with the forum, a number of courts have held that the presence of a defective product causing injury within the forum provides a sufficient contact with the nonresident so that jurisdiction can be asserted consonant with due process.¹⁴⁰ As one writer has observed:

In all product liability cases, one contact with the forum always exists — the product itself. Thus, the question is presented whether this single factor is a sufficient foundation upon which to assert personal jurisdiction over the nonresident manufacturer in a suit arising from this contact. . . .

It would seem consonant with fairness to subject the manufacturer to jurisdiction whenever his product gave rise to the cause of action within the forum state, even though the manufacturer had no other contact in the state. As far as the manufacturer's economic objectives are concerned, his overriding purpose is to have his product consumed. Where this consumption occurs is relatively insignificant to him. This observation supports the position that the manufacturer can be summoned to defend a cause of action arising out of the use of his product wherever it may be located. Any inconvenience that may be asserted is more than balanced by his interest in defending the integrity of his product, the maintenance of which may ultimately determine his economic success. There can be no unfairness in forbidding the manufacturer to disassociate himself from his product. In sum, the manufacturer should be amenable to personal jurisdiction wherever the product causes injury, wherever he may consensually submit to jurisdiction, and wherever he may have purposefully established direct connections with the forum.¹⁴¹

The changing concept of what contacts must be present in order

¹³⁷See *Bush v. Carpenter Bros., Inc.*, 447 F.2d 707 (5th Cir. 1971), and *Alford v. Whitsel*, 322 F. Supp. 358 (N.D. Miss. 1971).

¹³⁸357 U.S. 235 (1958).

¹³⁹*Smith v. Temco*, 252 So. 2d 212 (Miss. 1971).

¹⁴⁰See Note, *Jurisdiction In Personam Over Foreign Corporations In Products Liability Litigation*, 15 DEFENSE L.J. 336 (1966).

¹⁴¹See Note, *In Personam Jurisdiction Over Nonresident Manufacturers In Product Liability Actions*, 63 MICH. L. REV. 1028, 1031-32 (1965).

for proper assertion of jurisdiction was also discussed in *Gray v. American Radiator & Standard Sanitary Corp.*:¹⁴²

As a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products. Advanced means of distribution and other commercial activity have made possible these modern methods of doing business, and have largely effaced the economic significance of State lines. By the same token, today's facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other States.

Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted. Our unchanging principles of justice, whether procedural or substantive in nature, should be scrupulously observed by the courts. But the rules of law which grow and develop within those principles must do so in the light of the facts of economic life as it is lived today. Otherwise the need for adaptation may become so great that basic rights are sacrificed in the name of reform, and the principles themselves become impaired.¹⁴³

Although a number of states have declined to follow this liberal trend, it seems clear that the Mississippi Supreme Court and the Fifth Circuit Court of Appeals have determined that assertion of jurisdiction over a nonresident based upon the commission of a tort either "in whole or in part" within the state against a resident does not violate guarantees of due process.¹⁴⁴ However, it should be kept in mind that although constitutional limitations have changed radically during the past several years, such limitations have not been discarded altogether. In *Coulter v. Sears, Roebuck & Co.*,¹⁴⁵ it was noted:

The existence of the trend should not be interpreted to herald the "eventual demise of all restrictions on the personal jurisdiction of state courts." "The island of Tobago still may not impose its will upon the whole world." The due process clause continues to define the limits of state jurisdictional (sic) power over nonresidents.¹⁴⁶

¹⁴²22 Ill. App. 2d 432, 176 N.E.2d 761 (1961).

¹⁴³*Id.* at 766.

¹⁴⁴*Bush v. Carpenter Bros., Inc.*, 447 F.2d 707 (5th Cir. 1971); *Dawkins v. White Products Corp.*, 443 F.2d 589 (5th Cir. 1971); *Alford v. Whitsel*, 322 F. Supp. 358 (N.D. Miss. 1971); *Smith v. Temco*, 252 So. 2d 212 (Miss. 1971).

¹⁴⁵426 F.2d 1315 (5th Cir. 1970).

¹⁴⁶*Id.* at 1317.

Having considered the constitutional aspects of this portion of section 1437, the next point of inquiry is its practical application. The initial recognition in Mississippi of the single tort provision of the statute is found in *Mladinich v. Kohn*,¹⁴⁷ which was twice before the Mississippi Supreme Court. In that case the defendant, a resident of Louisiana, was sued in three separate suits in the Circuit Court of Harrison County, Mississippi, for an allegedly slanderous speech which he had delivered within this state. Since he was no longer physically present within the state, service of process was attempted under section 1437 on the contention that the defendant was doing business here. All three suits were dismissed for lack of jurisdiction, and the action of the trial court was affirmed on appeal. Thereafter suit was reinstituted and service of process was attempted under the newly enacted single tort provision of section 1437, *supra*. Again the plaintiffs' cases were dismissed for lack of jurisdiction, and the second appeal was prosecuted to the Mississippi Supreme Court. On appeal the court determined that since the act upon which jurisdiction was asserted occurred prior to the date on which the amended provision of section 1437 became effective (July 1, 1964), the ruling of the trial court in dismissing for lack of jurisdiction had been proper. Although the court determined that the provisions of the amended statute would not be applied retroactively,¹⁴⁸ the court assumed that had the act upon which the plaintiffs sought to assert jurisdiction occurred after July 1, 1964, jurisdiction would have been proper, stating:

Since it is not necessary to this decision, we assume without deciding that, if Kohn had committed the alleged slander in this state after the effective date of Chapter 320, it would suffice to give a Mississippi court in personam jurisdiction over him. . . .¹⁴⁹

After gaining initial recognition in *Mladinich*, the single tort provision of section 1437 was to lie fallow for some seven years and was not upheld as a proper means for assertion of jurisdiction over a non-resident until 1971.¹⁵⁰ Although the wording of this portion of the statute is clear, there appeared to be judicial reluctance to accept the idea that a single transaction or act could provide a sufficient basis for

¹⁴⁷250 Miss. 138, 164 So. 2d 785 (1964); 186 So. 2d 481 (Miss. 1966).

¹⁴⁸It should be noted that subsequent to the second *Mladinich* decision section 1437 was amended to provide for retroactive application. MISS. CODE ANN. § 1437 (c) (Supp. 1971).

¹⁴⁹186 So. 2d at 482.

¹⁵⁰Cases cited note 144, *supra*.

assertion of jurisdiction.¹⁵¹ In at least one case¹⁵² the Mississippi Supreme Court declined to allow jurisdiction to be asserted over a non-resident defendant although the single tort provision of section 1437 could have warranted it. In *Collins v. Truck Equipment Sales, Inc.*¹⁵³ the plaintiff was the owner of a business which was destroyed by a truck owned by Hilbun Farms and driven by one of its employees. This truck contained a number of special modifications which had been installed by Truck Equipment Sales, Inc., an Alabama corporation not qualified to do business in this state. The plaintiff instituted suit against Truck Equipment Sales, Inc. in the Circuit Court of Jones County, Mississippi, alleging that the defective workmanship of the defendant on the truck in question had contributed to the accident in which his property was destroyed. Service of process was effectuated under section 1437, and the defendant entered its appearance solely for the purpose of challenging jurisdiction. Although the defendant had transacted some business within the state, the work done on the truck in question had taken place in Alabama. This case appears to have presented a perfect opportunity for application of the single tort provision of section 1437 under the theory that a tort was committed "in part" within Mississippi (i.e., a defective product causing injury within the state); however, the Mississippi Supreme Court held that the lower court had properly refused to assert jurisdiction since the plaintiff ". . . did not establish any causal relationship between the negligence alleged and the activities of the defendant within the forum state."¹⁵⁴

The reluctance of the Mississippi Supreme Court to approve utilization of the single tort provision of section 1437 is also reflected in the decisions rendered by the federal judiciary. In *Smith v. Barker*¹⁵⁵ the plaintiff, a resident of Mississippi, brought a suit in a state court against Portable Elevator Manufacturing Company, an Illinois corporation not qualified to do business in this state, and Barker, a resident of the state

¹⁵¹See the dissenting opinion in *Roberts v. Worthern Bank & Trust Co.*, 183 So. 2d 811, 817 (1966), involving the interpretation of the Arkansas Long Arm Statute, ARK. STAT. ANN. §§ 27-2501 to 2507 (Supp. 1963) (which the majority classified as much broader than section 1437) wherein it was stated that ". . . a single transaction is insufficient to subject a nonresident individual to the personal jurisdiction of the state where the transaction took place. . . ."

¹⁵²*Collins v. Truck Equip. Sales, Inc.*, 231 So. 2d 187 (Miss. 1970). See also *Breckenridge v. Time, Inc.*, 253 Miss. 835, 179 So. 2d 781 (1965), wherein the court pretermitted the question of whether jurisdiction could be asserted under the single tort provision of section 1437.

¹⁵³231 So. 2d 187 (Miss. 1970).

¹⁵⁴*Id.* at 188.

¹⁵⁵306 F. Supp. 1173 (N.D. Miss. 1968).

of Tennessee, for injuries received when struck by an allegedly defective grain elevator, manufactured by Portable Elevator and sold to the plaintiff by Barker. Service of process had been effectuated on both the defendants by means of section 1437, and once the case had been removed to federal court, both defendants moved to dismiss for lack of personal jurisdiction. The court overruled Barker's motion, since it determined that his contacts with the forum were systematic and continuous, but refused to assert jurisdiction over Portable Elevator, since its only contact with Mississippi was the presence of a defectively manufactured product. In declining jurisdiction, the court stated:

Notwithstanding that in 1964, an amendment was added to section 1437 which, applied literally, would appear to have broadened its scope, the Mississippi Court has continued to interpret the Long-arm Statute restrictively. . . .

Thus, although the Supreme Court of the United States has ruled in recent years that the states may constitutionally extend their jurisdiction over nonresidents to an extent greater than that permitted by the State Supreme Court, (*McGee v. International Life Insurance Company*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed. 223 (1957)), we are bound by the construction placed upon section 1437 by the state's highest tribunal, and we determine that the Mississippi Court would, if confronted with the facts presented here, hold jurisdiction lacking as to Portable Elevator. . . .¹⁵⁶

In *Neal v. Trim-Master Corp.*¹⁵⁷ the defendant, Trim-Master Corporation, a foreign corporation not qualified to do business in Mississippi, manufactured a machine which was installed in a plant where the plaintiff was employed. The plaintiff was injured while working with this machine and brought suit against Trim-Master, alleging negligence in the design of the machine in question. Service of process was attempted under section 1437, and Trim-Master removed the case to federal court and moved to dismiss for lack of jurisdiction. In its decision sustaining the defendant's motion, the court isolated the issue before it as follows:

The sole issue presented here is whether the Mississippi "Long-arm Statute", Miss. Code Ann. Sec. 1437(a) (1942 Recomp.), subjects to in personam jurisdiction of local courts a nonresident corporation whose only contact with the forum state is the presence within its territorial boundaries of a product manufactured elsewhere by it which has allegedly caused injury in Mississippi to a resident of that state.¹⁵⁸

¹⁵⁶*Id.* at 1175, 1176.

¹⁵⁷48 F.R.D. 390 (N.D. Miss. 1969).

¹⁵⁸*Id.* at 390.

The court then discussed the basis for its decision as is set out below:

Thus, as the Mississippi Court has interpreted the amended statute as requiring more than a sporadic or isolated activity unaccompanied by continuing action of the corporation within the state, we are constrained to hold, as a matter of state law, that personal jurisdiction over the defendant Trim-Master may not be maintained. Although it markets its products throughout the United States, it is not shown to have any property, office, bank account, warehouse, inventory, telephone listing, or agent of any kind in Mississippi. . . .¹⁵⁹

Until recently, those favoring a more liberal interpretation may have felt that Mississippi's long arm statute had suffered a permanent judicial amputation.¹⁶⁰

However, in February of 1971 the Federal District Court for the Northern District of Mississippi handed down the decision of *Alford v. Whitsell*,¹⁶¹ which at last recognized the validity of the single tort provision of section 1437. In that case suit was instituted by the plaintiff, a resident of this state, in federal district court, seeking to recover damages for malicious prosecution from the defendant, who was a resident of Missouri. The plaintiff's case was based on the allegation that the defendant had willfully appeared before a Mississippi grand jury and by withholding the true facts from said grand jury, had prevailed upon them to return a criminal indictment against the plaintiff for false pretenses. Service of process was effectuated under section 1437, and the defendant moved to dismiss for lack of jurisdiction. This motion was overruled on the basis that the defendant was amenable to service of process under section 1437, since he had allegedly committed a tort within this state against a resident. The court commented:

The Supreme Court of Mississippi has not defined a rule pertaining to state jurisdiction over a single, isolated tort committed within the state. *Mladinich I, supra*. This diversity court sits as a state court in this action and must decide the issue as the court believes the Mississippi Supreme Court would decide it.

The "Long Arm" statute is plain and unambiguous. The statute states in clear language that a nonresident person who commits a tort in whole or in part in this state against a resident of this state, shall by such act be deemed to be doing business in Mississippi, thereby designating the Secretary of State as his process agent.

¹⁵⁹*Id.* at 392.

¹⁶⁰*See* Casano v. WDSU-TV, Inc., 313 F. Supp. 1130, 1137 (S.D. Miss. 1970).

¹⁶¹322 F. Supp. 358 (N.D. Miss. 1971).

It is abundantly clear that the defendant, a nonresident person, committed a tort within this state against plaintiff, a resident of the state.¹⁶²

Shortly after the *Alford* case was decided, the Fifth Circuit Court of Appeals handed down the decision of *Dawkins v. White Products Corp.*,¹⁶³ which further recognized the validity of the single tort provision of section 1437. In that case the plaintiff instituted suit in a state court against two nonresident corporations not qualified to do business in Mississippi, seeking to recover for damage done to his place of business by an allegedly defective hot water heater which had exploded. The heater in question had originally been manufactured by one of the defendants in Michigan, and the thermostat attached thereto had been manufactured by the other defendant in Ohio. The heater was placed in the stream of commerce by the defendants and eventually reached a local hardware store in Louisville, Mississippi, where it was purchased by the plaintiffs. Service of process was originally attempted on both defendants under section 1437, based on the allegation that they were "doing business" in this state. The case was removed to federal court, and the defendants promptly moved to dismiss for lack of jurisdiction. At this point the plaintiffs amended their declaration to allege that the defendants were also subject to jurisdiction under the single tort provision of section 1437. The defendants' motion to dismiss was sustained by the district court but was reversed on appeal to the Fifth Circuit Court of Appeals. Upholding jurisdiction over the defendants under the single tort provision of section 1437, the court noted that this portion of the statute had yet to be construed by the Mississippi Supreme Court and that all of the decisions since the provision had been added in 1964 had dealt solely with the "doing business" portion of the statute. Although without guidelines as to how this provision would be applied by the Mississippi Supreme Court, the court was of the opinion that the clear wording of the statute could not be ignored, and thus jurisdiction was upheld. The court commented:

In view of the fact that this latest case makes clear that all of the earlier cases, as well as the one before it, treated only of the "doing business" basis for long-arm service, and in view of the very apparent intent of the legislature to *add* the contract basis and the local tort basis to the already existing basis of doing business within the state, we are inclined to follow the clear language of the statute in the absence of any Mississippi decision that states that these additional bases added nothing to the

¹⁶²*Id.* at 362.

¹⁶³443 F.2d 589 (5th Cir. 1971).

statute. There is no such decision. We are convinced, Erie-bound as we are, to conclude that the Mississippi Supreme Court, given the facts and presented with the issue, would hold that the complaint as here amended alleged facts which, in spite of the affidavits of nonpresence in the state, would permit service on the non-residents under the amended long-arm statute. . . .¹⁶⁴

The dam having been broken by the *Alford* and *Dawkins* cases, it was not long before the Mississippi Supreme Court was called upon to rule upon the validity of the single tort provision of section 1437. In *Smith v. Temco*¹⁶⁵ suit was instituted by two residents in circuit court in Mississippi against a foreign corporation not qualified to do business in this state, seeking to recover damages allegedly caused by the explosion of a hot water heater manufactured by the defendant. The facts reveal that the hot water heater in question had been manufactured outside this state and sold by the defendant to a Louisiana dealer, who sold the unit to a local Mississippi retailer, from whom it was purchased by the plaintiffs. The case was dismissed by the trial court for lack of jurisdiction. On appeal the sole question before the supreme court was whether section 1437, as broadened by amendment in 1964, conferred jurisdiction on the trial court. Since the sole contact of the defendant with the forum was the presence herein of an allegedly defective product, the court noted that its decision turned primarily upon the interpretation to be placed upon the language added by the 1964 amendment providing for assertion of jurisdiction based upon the commission of a tort "in part" in this state. In construing the single tort provision of section 1437, the court took the position that since a tort is not complete until injury connected therewith takes place, if the injury occurs in this state, a tort has been committed at least "in part" herein; and jurisdiction may properly be asserted under section 1437.¹⁶⁶ The court commented on its decision as follows:

In our view, one of the fundamental objects of the Legislature in adopting the 1964 amendment was to extend the personam jurisdiction of the courts of this State to the nonresident who may commit a tort in this State, either in whole or in part, to

¹⁶⁴*Id.* at 594.

¹⁶⁵252 So. 2d 212 (Miss. 1971).

¹⁶⁶It should be noted that some courts question whether the single tort provision of a long arm statute may serve as a proper basis for jurisdiction over a nonresident manufacturer whose sole contact with the forum state is the presence of a defective product unless there is a showing that the manufacturer could reasonably have anticipated that his product would be sold in the forum. See Bourdeaux, *How Long An Arm*, 4 MISS. DEF. L.J. 45, 49-51 (1969); *Deveny v. Rheem Mfg. Co.*, 319 F.2d 124, 128 (2d Cir. 1963).

the injury of a resident of the State so as to provide a practical means for the enforcement of rights accruing under the products liability doctrine.

Under the amended statute, a nonresident manufacturer of a dangerously defective or unsafe product who places it in interstate commerce for the purpose of distribution and ultimate sale to consumers in other States, whether with a specific intent that it be distributed, sold and used in this State or not, may be subjected to a personam action for damages in the courts of this State by such consumer who may be injured in this State as a result of its defective or unsafe condition.¹⁶⁷

Thus, in view of the *Alford*, *Dawkins* and *Temco* decisions,¹⁶⁸ there no longer seems any reason to doubt the validity of the single tort provision of section 1437. It is further submitted that the *Dawkins* and *Temco* decisions represent a liberal interpretation of this type of statute (since they approve of assertion of jurisdiction in situations where the tort is committed only partially within the forum) and may be taken as an indication that the single tort provision of the statute may now be utilized to the fullest extent possible.

C. *The Doing Business Provision*

The third and final category of nonresidents who are subject to service of process under section 1437 is those who “. . . shall do any business or perform any character of work in this State. . . .”¹⁶⁹ which will be referred to as the “doing business” provision. This provision was unchanged by the 1964 amendments, and cases decided prior to 1964, discussed in Part I, are still pertinent when determining whether a nonresident may be subjected to service of process on this basis.

After applying various constitutional standards to this portion of the statute over the years,¹⁷⁰ the Mississippi Supreme Court announced a three-part test in *Mladinich v. Kohn*,¹⁷¹ which has been uniformly applied since that decision was rendered in 1964.¹⁷² In *Mladinich* the court held that the following three factors must always coincide before jurisdiction can properly be asserted:

¹⁶⁷252 So. 2d at 215, 216.

¹⁶⁸See also *Bush v. Carpenter Bros., Inc.*, 447 F.2d 707 (5th Cir. 1971).

¹⁶⁹MISS. CODE ANN. § 1437 (Supp. 1971).

¹⁷⁰See *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964), for a complete discussion of the history of this portion of the statute prior to 1964.

¹⁷¹164 So. 2d 785 (Miss. 1964).

¹⁷²*Dawkins v. White Prod. Corp.*, 443 F.2d 589, 593 (5th Cir. 1971).

(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.¹⁷³

Since this test is nothing more than a composite reading of the due process requirements laid down by the United States Supreme Court in *International Shoe Co. v. Washington*,¹⁷⁴ *McGee v. International Life Insurance Co.*,¹⁷⁵ and *Hansen v. Denckla*,¹⁷⁶ its validity is clear.¹⁷⁷

Although some earlier writers¹⁷⁸ have taken the position that the *Mladinich* rule is also applicable to the single contract and single contract tort provisions of section 1437, the case of *Dawkins v. White Products Corp.*¹⁷⁹ appears to dispel this notion and seems to indicate that the rule has thus far been applied by the Mississippi Supreme Court solely to the doing business provision of the statute. In *Dawkins* it was argued that the Mississippi Supreme Court had utilized the *Mladinich* case to establish standards to be applied to section 1437 as broadened by the 1964 amendment. However, the court rejected this contention and stated:

We find nothing in the *Mladinich* opinion to warrant such a contention. We view the language, rather, as a cautionary note that additional basis for application of the Section had been added, but the court would not deal with them because they had not yet become the law.

It is true that the Mississippi Supreme Court has decided several cases under the amended statute in which the court has continued to treat of the "doing business" basis for service by repeating the same formulation of requirements outlined in *Mladinich* and earlier cases. . . .

However, careful analysis of each of these cases relied upon by appellee — . . . makes plain the fact that in *none* of these cases

¹⁷³164 So. 2d at 790.

¹⁷⁴326 U.S. 310 (1945).

¹⁷⁵355 U.S. 220 (1957).

¹⁷⁶357 U.S. 235 (1958).

¹⁷⁷See Note, *A New Sole For International Shoe*, *supra* note 64, at 351, wherein this rule was apparently originally promulgated.

¹⁷⁸See Bourdeaux, *supra* note 166, at 45.

¹⁷⁹443 F.2d 589 (5th Cir. 1971).

was the amendment dealing with a nonresident who committed a tort in whole or in part within the state in issue.¹⁸⁰

The conclusion reached by the Fifth Circuit Court of Appeals in this regard was apparently correct, since shortly thereafter the Mississippi Supreme Court stated in *Smith v. Temco*¹⁸¹ that it had never passed upon the effect of the 1964 amendment to section 1437.

In any event, there is little doubt that the *Mladinich* test is presently applicable to the "doing business" provision of section 1437, since it has been applied in virtually every decision rendered by the Mississippi Supreme Court since 1964.¹⁸² In order to determine the manner in which this test has been applied, those cases decided under the doing business provision of section 1437 since 1964 require brief review.

In *Breckenridge v. Time, Inc.*¹⁸³ suit was instituted by Breckenridge, a resident of Mississippi, against Time, Inc., a nonresident corporation not qualified to do business here, seeking to recover damages for an allegedly defamatory article and accompanying pictures which appeared in a magazine published by the defendant. Service of process was attempted under section 1437, and Time appeared specially to contest jurisdiction. The following facts were developed at the hearing held on the defendant's motion to dismiss. Time is a New York corporation not qualified to do business in Mississippi, whose principal place of business is in New York City. It had no property or assets within the state of Mississippi nor did it lease any office space or maintain any bank accounts or corporate records within this state. A small amount of Time's advertising revenue was attributable to advertisers from within Mississippi. The only regular employees of the corporation who entered the state were an occasional manager or salesman who interviewed prospective advertisers; however, all advertising contracts were made in New York. Regular subscriptions to magazines published by Time were mailed from outside Mississippi directly to subscribers. The only direct sale of magazines by Time within the state was to wholesale distributors who in turn resold said magazines to retailers for consumption by the public. The only direct solicitation of subscriptions within the state by Time was through the mail; however, certain inde-

¹⁸⁰*Id.* at 593.

¹⁸¹252 So. 2d at 215.

¹⁸²*See* *Collins v. Truck Sales Equip., Inc.*, 231 So. 2d 187 (Miss. 1970); *Hilbun v. California Western State Life Ins. Co.*, 210 So. 2d 307 (Miss. 1968); *Republic Transcon Indus., Inc. v. Templeton*, 253 Miss. 132, 175 So. 2d 185 (1965); *Breckenridge v. Time, Inc.*, 253 Miss. 835, 179 So. 2d 781 (1965).

¹⁸³253 Miss. 835, 179 So. 2d 781 (1965).

pendent third parties were authorized to solicit subscriptions although they were without authority to enter into contracts on behalf of Time, all subscriptions being accepted in Chicago, Illinois. Material for articles appearing in magazines published by Time was obtained either from independent third parties known as "stringers" or from news releases put out by the Associated Press. The information for the story in question had been purchased from a stringer, and the pictures had also been sold by an independent third party to Time in a transaction which took place outside the state. This story had been written and edited in New York and was printed in Illinois, California, and Connecticut. Based on these facts, jurisdiction was declined by the trial court, and this decision was affirmed by the Mississippi Supreme Court. After noting that the rule set forth in *Mladinich* defined the constitutional limitations of section 1437, the court commented on the application of said rule:

In the instant case Time, Inc., did not purposefully do any act or consummate any transaction in this state, so the cause of action did not arise from any act or transaction in this state. The quality, nature, and extent of the activity of appellee in the forum state were at the most inconsequential. . . .

It would be unreasonable under these facts to assume jurisdiction, and would offend traditional notions of fair play and substantial justice. Those minimal contacts which are prerequisite to personal jurisdiction of the courts of Mississippi over a nonresident defendant are totally lacking as to appellee. Nor did this action arise out of any commercial or business transaction taking place in this state. Certainly just any inconsequential contact with the state of the forum is not sufficient to support jurisdiction over a nonresident under the due process clause. . . .¹⁸⁴

In *Republic Transcon Industries v. Templeton*¹⁸⁵ suit was instituted by the plaintiff, Templeton, in the Circuit Court of Oktibbeha County, Mississippi, against the defendant, Republic Transcon Industries, a Michigan corporation not qualified to do business in Mississippi, seeking to enforce a default judgment previously entered against a subsidiary of the defendant known as the Mathes Company, Inc. At the time this default judgment was obtained, Mathes was owned by a third party and was purchased subsequently by Republic Transcon. The plaintiff asserted that Republic Transcon was liable for the judgment entered against Mathes, since it had acquired the assets of said corporation subject to its liabilities. Service of process was attempted on

¹⁸⁴*Id.* at 784.

¹⁸⁵253 Miss. 132, 175 So. 2d 185 (1965).

Republic Transcon by serving Kleban, a local resident, alleged by the plaintiff to be the agent of Republic in its operation of Mathes, and by service on the Secretary of State under section 1437, based on the allegation that the defendant was doing business herein. The facts reveal that Kleban operated a heating and cooling business in Oktibbeha County and had been a sales representative of Mathes. However, other than having ordered various parts by mail, he had virtually no contact with Republic Transcon, nor had he installed any Mathes equipment or issued any warranties on such equipment after Mathes was acquired by Republic Transcon. Republic Transcon owned no property within this state and had no agents or employees herein, all sales being made solely through "sales representatives" who worked on a commission basis and over whom the company had no control. Republic Transcon's motion to dismiss for lack of jurisdiction was overruled, and subsequently the plaintiff procured a default judgment when Republic Transcon failed to comply with further orders of the court. On appeal the Mississippi Supreme Court held that the lower court did not have jurisdiction because Kleban had not been an agent of the defendant upon whom process could be served,¹⁸⁶ and the defendant had done nothing within this state which would subject it to jurisdiction under the rule announced in *Mladinich v. Kohn*.¹⁸⁷

In *Hilbun v. California-Western States Life Insurance Co.*¹⁸⁸ the plaintiff instituted suit in a state court of Mississippi, seeking to enforce a claim under an insurance policy issued by the defendant, a non-resident insurance company. Service of process was attempted on the defendant pursuant to section 5705-12,¹⁸⁹ which is similar to section 1437

¹⁸⁶*Id.* at 188.

¹⁸⁷*Id.* at 189.

¹⁸⁸210 So. 2d 307 (Miss. 1968).

¹⁸⁹Miss. CODE ANN. § 5705-12 (Supp. 1971). This section provides in part for service of process over foreign insurance companies not authorized to transact business in Mississippi as follows:

Any of the following acts in this state, effected by mail or otherwise, by an unauthorized or alien insurer: (1) the issuance or delivery of contracts of insurance to residents of this state or to corporations authorized to do business therein, (2) the solicitation of applications for such contracts, (3) the collection of premiums, membership fees, assessments or other considerations for such contracts, or (4) any other transaction of insurance business, is equivalent to and shall constitute an appointment by such insurer of the commissioner of insurance and his successor or successors in office, to be its true and lawful agent, upon whom may be served all lawful process in any action, suit, or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contract of insurance, and any such act shall be signification of its agreement that such service of process is of the same

and provides for service of process over foreign insurance companies not authorized to transact business in Mississippi. The policy in question had been issued to the plaintiff while he was in Louisiana, and he had suffered the injury upon which he based his claim while outside this state. The defendant had never been licensed to do insurance business in this state, had no agents or employees herein for the purpose of selling insurance, and solicited no sales of insurance by mail within the state. The only contact which the defendant had with Mississippi was the fact that in one instance it had paid a portion of a hospital bill under the policy of insurance covering the plaintiff. Based upon this set of facts, the lower court declined to assert jurisdiction. On appeal the Mississippi Supreme Court noted the similarity between section 5705-12 and section 1437 and stated that applying the test announced in *Mladinich* to the case then before it, the lower court had properly determined that it did not have jurisdiction, commenting:

In applying these standards to the present case and being aware of the fact that the employer is the agent of the employee, we are of the opinion that the lower court correctly held there was insufficient minimal contact to constitute the insurance commissioner the agent for service of process, as the part payment was an isolated, single act instituted by the appellant through his employer and was not the act of the insurer in soliciting, issuing, or delivery of contract or policy of insurance. It also was not such transaction of insurance business as would constitute bringing the statute into effect, as this isolated act would violate, in our opinion, traditional notions of fair play and substantial justice when consideration is given to the quality, nature, and extent of the defendant's activity in this state.¹⁹⁰

In the case of *C. H. Leavell & Co. v. Doster*¹⁹¹ an action was instituted in a state court by two nonresident corporations, both of whom were qualified to do business in Mississippi, against a third corporation not qualified to do business in this state. The plaintiffs were primary contractors, and this suit arose out of the performance of a subcontract entered into with the defendant. The plaintiffs alleged that in the performance of the contract in question within Mississippi, the defendant was doing business herein. Service of process was effectuated under section 1437, but on motion of the defendant the case was dismissed for lack of jurisdiction. On appeal the supreme court reversed the action of the lower court and held that by having performed the

legal force and validity as personal service of process in this state upon such insurer.

¹⁹⁰210 So. 2d at 310, 311.

¹⁹¹211 So. 2d 813 (Miss. 1968).

contract in question within this state, the defendant was subject to jurisdiction under the "doing business" provision of section 1437 as well as the "single contract" provision of that statute.¹⁹²

In *Collins v. Truck Sales Equipment, Inc.*¹⁹³ suit was instituted by the plaintiff, Collins, for damage done to his store when it was struck by a truck owned by Hilbun Farms, Inc. and modified by the defendant, Truck Sales Equipment, Inc., at its plant in Alabama. The defendant appeared and filed a motion to dismiss for lack of jurisdiction which was sustained by the trial court. The facts revealed that the president of the defendant corporation had made a number of trips to Mississippi in working out the details of the work to be performed for Hilbun Farms, and said corporation had several representatives within the state soliciting the sale and installation of its products. However, all trucks modified by the defendant had been delivered by the owners to the defendant's plant in Alabama, where the work in question was performed, and picked up there by the owners after repairs had been completed. On appeal the Mississippi Supreme Court held that the lower court had properly dismissed the case for lack of jurisdiction. The court noted that the test announced in *Mladinich v. Kohn* and subsequent decisions spelled out the requirements for determining whether one is "doing business" in Mississippi and stated that the plaintiff had failed to meet these requirements since ". . . he did not establish any causal relationship between the negligence alleged and the activities of the defendant within the forum state."¹⁹⁴

In *E. B. Kaiser Co. v. Ludlow*¹⁹⁵ suit was filed in state court by H. M. Ludlow, d/b/a H. M. Ludlow Company, a resident of Mississippi, against E. B. Kaiser Company, an Illinois corporation not qualified to do business herein, to recover commissions allegedly due under an exclusive sales representative agreement executed by the parties. Under this contract Ludlow solicited orders for, supervised installation of, and investigated and corrected complaints pertaining to Kaiser products. In addition thereto, representatives of Kaiser had visited the state in connection with the sales out of which the controversy in question had arisen. Kaiser appeared specially and moved to dismiss on the basis that

¹⁹²*Id.* at 814-15. It is submitted that the failure of the court to mention the Mladinich rule in this case was due to the fact that jurisdiction was asserted primarily under the single contract provision of section 1437.

¹⁹³231 So. 2d 187 (Miss. 1970).

¹⁹⁴*Id.* at 188. This holding would appear to be based on the second requirement set out in the Mladinich rule which requires that the cause of action must arise out of whatever activity the nonresident may have taken in the forum state.

¹⁹⁵243 So. 2d 62 (Miss. 1971).

it was not amenable to service of process. This motion was overruled by the trial court and affirmed on appeal to the Mississippi Supreme Court. The supreme court made no mention of the *Mladinich* rule in its opinion, but commented as follows:

The "long arm" statute in its present form was in force at the time of the last renewal of the contract between Kaiser and Ludlow and before completion of the orders or jobs for which commissions were claimed by Ludlow. . . .

. . . .

We are of the opinion that the chancellor was justified in finding that Kaiser was amenable to the process and jurisdiction of the courts of this state. The contract with Ludlow was fully performed by Ludlow in this state. . . . Kaiser did business in the state in the amount of \$613,190, consisting of seven different orders or jobs with six different firms engaged in the construction of the test facility for NASA. Because of the unusual processes of installation of the insulated piping involved in these orders, officials and other representatives of Kaiser made numerous trips to the test facility site to assist in the installations.

Kaiser's business activities in Mississippi were rather extensive. It cannot be said that the quality and nature of these activities were inconsequential. In our opinion the chancellor was fully justified in finding that Kaiser was doing business in the state within the meaning of the statutes making nonresidents amenable to suit in this state. . . .¹⁹⁶

Brief mention should also be given to certain federal cases handed down since 1964, which deal with "doing business" as a means of jurisdiction under the statute.¹⁹⁷ In *Easterling v. Volkswagen of America, Inc.*¹⁹⁸ the plaintiff, a resident of Mississippi, filed suit in a state court against Volkswagen of America, International Auto Sales & Service, Inc. (both nonresident corporations not qualified to do business in Mississippi), and Steadman Motor Company, Inc., a Mississippi corporation. Volkswagen of America is an importer of foreign cars, which it sells to regional distributors throughout the United States. International Auto Sales & Service, Inc. was a regional distributor of Volkswagen automobiles for the mid-south area, which included Mississippi. Steadman

¹⁹⁶*Id.* at 66, 67.

¹⁹⁷It should be noted that this article does not contain a complete discussion of all federal decisions which have construed section 1437 since 1964. See *Bush v. Carpenter Bros., Inc.*, 447 F.2d 707 (5th Cir. 1971); *Magna Corp. v. Duquesne Elec. & Mfg. Co.* (S.D. Miss. 1971), not yet reported, and *Casano v. WDSU-TV, Inc.*, 313 F. Supp. 1130 (S.D. Miss. 1970).

¹⁹⁸308 F. Supp. 966 (S.D. Miss. 1969).

Motor Company, Inc. was a retail dealer in the State of Mississippi and purchased its vehicles from International Auto Sales & Service, Inc. The plaintiff's suit was based on breach of warranty and negligence in the design of a Volkswagen automobile in which his wife was injured. The car in question had been imported to the United States by Volkswagen of America, sold to International Auto Sales & Service, Inc., who had sold the vehicle to the Willard E. Robertson Corporation, a New Orleans, Louisiana, retail dealer; and the plaintiff was a subsequent purchaser thereof. Suit was voluntarily dismissed against Steadman Motor Company, Inc. and on motion of the remaining defendants, the case was removed to federal court. Thereafter, both defendants filed separate motions to dismiss for lack of jurisdiction. Since Volkswagen of America had virtually no contacts with the state of Mississippi, its motion was sustained and will not be discussed here. The facts revealed that International was not qualified to do business in Mississippi, maintained no telephone listing, bank account, corporate books, office, warehouse or place of business within the State, and had paid no taxes here. However, as set out above, International purchased Volkswagen automobiles and parts from Volkswagen of America which it in turn sold to retail Volkswagen dealers throughout the State of Mississippi. International had salesmen and other employees, two of whom lived in Mississippi, visiting various dealers throughout the state on a regular basis. International had entered into a dealership agreement with Steadman Motor Company (and possibly with other Mississippi retail dealers), and under the terms of this contract, International maintained almost complete control over the manner in which the local dealer operated his business. Based on these contracts, the court was of the opinion that there could be little doubt that the defendant was doing business in the state of Mississippi. However, applying the second of the three-part test set out in *Mladinich v. Kohn*, the court declined jurisdiction since the suit did not arise out of any business which the defendant had transacted within the State. In a well-reasoned opinion the court discussed its decision in this regard as follows:

Having determined that the first criterion for conferring jurisdiction over nonresident corporations laid down in *Mladinich v. Kohn*, *supra*, has been met, that is, that the nonresident defendant foreign corporation, International, "has purposefully done some act or consummated some transaction in the forum state" and thus has done business in the State of Mississippi, it is next necessary to determine whether the second required prerequisite has been satisfied, namely, whether the cause of action herein has "arisen from or is connected with such act or transaction." The answer to this question is in the negative,

inasmuch as the automobile in question was not delivered by International to its dealer, Steadman, within the State of Mississippi nor was it sold by International to plaintiff or her husband in this state or in any other state. If, the plaintiff's cause of action arose out of these contacts or out of International's "doing business" in this State, e.g. if plaintiff's injuries had resulted from the defect in the Volkswagen shipped or sold directly to Steadman by International which ultimately reached plaintiff or her husband or any purchaser or seller in the line of sale after leaving Steadman, this second requirement would unquestionably be satisfied, but such is not the case. Instead, this Volkswagen in question was sold by International to its dealer, Willard E. Robertson Corporation in New Orleans, who sold it to a purchaser and subsequently down the line of commerce it was purchased or acquired by plaintiff's husband. . . . Thus International is not amenable to process by the Courts of this State, State or Federal, since the present action does not arise out of, accrue from, and is not connected with the "business" conducted by International through Steadman in the State of Mississippi, as required by Section 1437 of the Miss. Code as construed in *Mladinich v. Kohn*. In other words, this cause of action did not arise out of or accrue from and is not connected with the delivery by International to any dealer, including Steadman, within the State of Mississippi and thus it may not be subjected to suit in the courts within this State under the *Mladinich* doctrine, despite the fact that in the absence of this requirement, due process would be satisfied by the above activities or "contacts" of International within the State of Mississippi. . . .¹⁹⁹

Another case decided by the U. S. District Court for the Southern District of Mississippi presents some unique problems in connection with this portion of section 1437. In *Hyde Construction Co. v. Koehring Co.*²⁰⁰ separate suits were filed by a Mississippi corporation and an individual resident of this state against a Wisconsin corporation in the Circuit Court of Hinds County, seeking damages for abuse of process of the United States District Court for the Northern District of Oklahoma. Both cases were removed to U.S. District Court for the Southern District of Mississippi and were considered together on the defendant's motion in each case to dismiss for lack of jurisdiction. The facts set out in the opinion revealed that the defendant had been authorized to do business in Mississippi between January 9, 1964, and September 12, 1968, and during such time had appointed a local corporation as its agent for service of process. On September 12, 1968, pursuant to the

¹⁹⁹*Id.* at 981.

²⁰⁰321 F. Supp. 1193 (S.D. Miss. 1969).

terms of section 5309-234,²⁰¹ it withdrew from the state and revoked the authority of its local agent to accept process on its behalf. This section provides that any nonresident corporation which is qualified to do business in Mississippi may voluntarily withdraw from the state and revoke the authority of its registered agent to accept process on its behalf, but it further provides that in order to do so, the corporation must consent to service of process on the Secretary of State of Mississippi in any subsequent cause of action which arose in this state during the time it was qualified to do business here. Plaintiffs originally predicated jurisdiction under this section by service on the Secretary of State of Mississippi, alleging that their causes of action had accrued during the time the defendant was authorized to do business herein. By amendment the plaintiffs further asserted that defendant was amenable to service of process under the "doing business" provision of section 1437, alleging that after the date of its formal withdrawal from this state, it had continued transacting business herein of a sufficient nature to constitute doing business within the meaning of this provision.²⁰² Discussing the problems involved in the case, the court first noted that section 1437 was applicable only to corporations who were not qualified to do business in Mississippi, and therefore the actions of the defendant during the period it was qualified to do business in this state could not serve as a basis for assertion of jurisdiction under said section. Thus, only the actions of the defendant subsequent to September 12, 1968, were considered by the court in determining if the doing business provision of section 1437 could properly be applied. The opinion rendered by the court further reveals that after the defendant formally withdrew

²⁰¹MISS. CODE ANN. § 5309-234 (Supp. 1971). This section provides in part as follows:

A foreign corporation authorized to transact business in this state may withdraw from (sic) this state upon procuring from the Secretary of State a certificate of withdrawal. In order to procure such certificate of withdrawal, such foreign corporation shall deliver to the Secretary of State an application for withdrawal, which shall set forth: (d) That the corporation revokes the authority of its registered agent in this state to accept service of process and consents that service of process in any action, suit or proceeding based upon any cause of action arising in this state during the time the corporation was authorized to transact business in this state may thereafter be made on such corporation by service thereof on the Secretary of State. . . .

²⁰²It should also be noted that the plaintiffs sought to assert jurisdiction under the single tort provision of section 1437, however, since the court's decision did not turn on this provision, it will not be considered here. The court also considered whether jurisdiction could be asserted pursuant to the terms of MISS. CODE ANN. §§ 5345 and 5346 (1956), however, time and space limitations also preclude discussion of these sections.

from Mississippi in 1968, it continued to conduct a substantial amount of business activity herein. Although it maintained no offices within the state and had no employees residing herein, two of its employees visited the state each month to supervise and assist various local distributors of the defendant's products. The defendant had also entered into contracts with local distributors whereby it maintained a moderate degree of control over the manner in which these distributorships were operated. In addition, the defendant's sales within the state after its withdrawal were almost equal to its sales prior to that time. Based on this business activity, the court was of the opinion that the defendant was "doing business" in the state of Mississippi. However, the court further determined that since the plaintiffs' causes of action (for abuse of process on Oklahoma) did not arise out of and were not connected with any business activity which the defendant transacted within Mississippi, under the rule announced in *Mladinich v. Kohn*,²⁰³ jurisdiction could not be asserted under the doing business provision of section 1437. The court discussed the *Mladinich* rule as follows:

Having determined that the first criterion for conferring jurisdiction over nonresident corporations laid down in *Mladinich v. Kohn*, *supra*, has been met, that is, that Koehring "has purposefully (done) some act or consummate (d) some transaction in the forum state", and thus has done business in the State of Mississippi, it is next necessary to determine whether the second required prerequisite of *Mladinich* has been satisfied, namely, whether the cause of action herein has "arisen from, or is connected with, such act or transaction." The answer to this question is in the negative, inasmuch as the alleged abuse of process did not arise from and is not connected with any of the acts or transactions carried on by Koehring in the State of Mississippi subsequent to September 12, 1968. If Koehring is guilty of abuse of process, this abuse of process did not arise from or is not connected with its business activities in the State of Mississippi from September 12, 1968 to the present. . . .²⁰⁴

However, even though jurisdiction could not be asserted under section 1437, the court determined that the defendant was amenable to service of process under the provisions of section 5309-234, since the plaintiffs' causes of action arose during the time the defendant was authorized to transact business here and thus under the provisions of said section, when the defendant withdrew from this state, it consented

²⁰³250 Miss. 138, 164 So. 2d 785 (1964).

²⁰⁴321 F. Supp. 1205, 1206.

to service of process on the Secretary of State in such actions. Therefore, the defendant's motions in these two cases were overruled.

It is clear that decisions of the Mississippi Supreme Court under the doing business provision of the statute since 1964 continue to require a substantial amount of business activity within the forum before jurisdiction will be upheld on this basis. If the court is willing to find that the due process requirements are satisfied in cases where the sole contact of the defendant is a single tort or a single contract, there is no reason to continue to require continuous and systematic activity in order to uphold jurisdiction under the doing business provision. Uniformity of the application of these standards to all provisions of the statute seems both desirable and logical.

III. CONCLUSION

It is evident that the literal terms of section 1437 provide a broad basis for the assertion of jurisdiction over nonresident defendants. Although the statute has not been construed as broadly as is permissible under federal decisions, a trend in favor of a more liberal utilization of its provisions does appear to be emerging. It is respectfully submitted that there is no longer any sound reason for adhering to a restrictive interpretation of the statute which, in effect, denies citizens of this state the opportunity to fully avail themselves of the means provided by the legislature for subjecting nonresidents to suit in Mississippi.

Since the terms of section 1437 are extremely broad, the basic consideration in every case should be whether the assertion of jurisdiction violates the requirements of due process as defined by the decisions of the United States Supreme Court. These requirements are primarily set forth in the decisions of *International Shoe Co. v. Washington*, *McGee v. International Life Insurance Co.*, and *Hanson v. Denckla* and have been succinctly summarized by the Mississippi Supreme Court in the three-part test announced in *Mladinich v. Kohn*. To insure that the requirements of due process are applied in a uniform manner, it is submitted that the three-part test announced in *Mladinich* should serve as the basis for determining whether jurisdiction is proper in every case arising under section 1437, although at present it is applied only to cases decided under the doing business provision of the statute. If our courts are willing to redefine the word "act," as used in this test (as have courts in other jurisdictions) to encompass such activities as use of the mail for solicitation of business and shipment of defectively manufactured products into this state, there is no reason why the test can

not also be applied to the single tort and single contract provisions of the statute.

By the adoption of a single test to be applied in all cases arising under section 1437, much of the confusion which has existed in the past, as to how the various provisions of the statute should be applied, would be cleared, and a certain degree of uniformity in future decisions would be assured.

JOINT TORTFEASORS — A CASE FOR UNLIMITED CONTRIBUTION

Harry R. Allen*

I. INTRODUCTION

Occasionally a tortfeasor is selected as the sole defendant in Mississippi in a cause of action arising out of the concurrent negligence of several wrongdoers. This is not common since the plaintiff is usually generous with his processes, directing them at any possible defendant who might contribute to a larger verdict. When it does occur, the discrimination is painfully frustrating to the defendant tortfeasor. "Misery" is the condition suffered by one of several joint wrongdoers who has been selected as the single defendant in a Mississippi court. Under the present law of contribution in Mississippi, that defendant must prepare for a legal "blitz," no matter how slight his negligence as contrasted to that of his concurrent tortfeasor, for that defendant has no right of contribution. Section 335.5 of the Mississippi Code only permits a right of contribution among joint tortfeasors when a joint judgment has been entered.¹ The Mississippi Supreme Court has interpreted this statute strictly.

The scope of this article is limited to the question of "contribution," rather than "indemnity."² Courts have often mistakenly intermingled the two terms.³

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¹MISS. CODE ANN. § 335.5 (1956). See app. I *infra*.

²A discussion of rights of indemnity can be found in W. PROSSER, LAW OF TORTS § 48 (3d ed. 1964). See also Comment, *Contribution Among Joint Tortfeasors*, 44 Tex. L. Rev. 326 (1965). The Mississippi Supreme Court has recognized the right of "indemnity" among tortfeasors in *Granquist v. Crystal Springs Lumber Co.*, 190 Miss. 572, 1 So. 2d 216 (1941), where it was held that a master was entitled to indemnity from his servant when the master's total responsibility was a vicarious liability for the tortious acts of the servant.

³See *Thomas v. Rounds*, 161 Miss. 713, 137 So. 894 (1931); *Illinois Central R.R. v. Bullock*, 181 F.2d 851 (5th Cir. 1950); *St. Louis-San Francisco Ry. v. United States*, 187 F.2d 925 (5th Cir. 1951). See also Annot., 60 A.L.R.2d 1366 (1958), where it is stated:

It is important that the reader bear in mind the distinction between a right to contribution and a right to indemnity, contribution importing the idea of equilization of burden, and indemnity or exoneration importing reimbursement in full to the party who has satisfied the injured person, on a theory of a primary liability resting on a person from whom recovery is sought. [*Id.* at 1369.]

The purpose of this article is to illustrate the basic injustice of the present Mississippi rule, which permits contribution among joint tortfeasors only in the very limited statutory situation of joint judgments. It attempts to trace the origin of the rule, examine trends throughout the country, analyze the present status of Mississippi law and consider the Uniform Contribution Among Tortfeasors Act.⁴

II. BASIC INEQUITIES OF THE COMMON LAW RULE RELATING TO JOINT TORTFEASORS

The right of contribution is one of equity. It appears that the doctrine is applicable when three elements are present: (1) a common liability; (2) a compulsory discharge of this common liability; and (3) one party bearing an unequal portion of the common burden.

Contribution is an independent right, inherently equitable in nature, and will not be enforced where it will produce an inequitable result.⁵

The right of contribution grows out of the relation of the parties to the obligation or from the nature of the relation between them and out of what they do. It is almost universally agreed that the doctrine of contribution is founded not upon contract but upon principles of equity and natural justice, which require that persons under a common burden shall bear it in equal proportions and one party shall not be subject to bear more than his just share to the advantage of his co-obligors. It is equally true, therefore, that the doctrine of contribution is founded upon morality, since no one ought to profit by another man's loss where he himself has incurred a like responsibility. Any other rule would put it in the power of the creditor to select his own victim and upon motives of mere caprice or favoritism to make a common burden a most gross personal oppression; it would be against equity for the creditor to exact or receive payment from one and to permit, or by his conduct to cause, the other debtors to be exempt from payment.⁶

The common law rule relating to joint tortfeasors is an exception which is diametrically opposed to the general common law principle permitting contribution among joint obligors. As the rule is stated by the *Restatement of Restitution*:

Where two persons acting independently or jointly, have negligently injured a third person or his property for which injury both became liable in tort to the third person, one of them

⁴9 U.L.A. 127 (Supp. 1967). See app. 2 *infra*, for complete text.

⁵18 AM. JUR. 2d *Contribution* § 3 (1965).

⁶*Id.* § 4.

who has made expenditures in the discharge of their liability is not entitled to contribution from the other.⁷

Yet, the comment in the *Restatement* expresses no enthusiasm for the rule:

a. The rule stated in this Section which denies contribution to one of two negligent persons whose negligence has contributed to an injury to a third person for which both are liable is explainable only on historical grounds.⁸

Prosser recognizes the injustices of the rule:

There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered on to one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.⁹

While the hardship of the rule is not often felt, applicable controversies are not uncommon. Consider the guest passenger in a two-car accident who refuses to sue his driver-companion out of friendship or no insurance. In another case one tortfeasor may be a "target" defendant (a common carrier or transport truck), and the other may be an individual with obviously limited financial means. In the latter event, the plaintiff could be fearful that a joinder of the individual tortfeasor in the same action with a "target" defendant would tend to minimize his verdict. Under these circumstances, the named defendants are required to absorb the entire loss.

We generally think of a "common law rule" as the embodiment of a traditional principle of inherent justice which has been tempered by years of usage. Ironically the "common law rule," as it evolved concern-

⁷RESTATEMENT OF RESTITUTION § 102 (1937). For a general discussion of the common law rule prohibiting contribution between those regarded as "joint tortfeasors," when one had discharged the claim of the plaintiff, see Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1930); Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L. Q. 552 (1936), 22 CORNELL L. Q. 469 (1937); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEX. L. REV. 150 (1947), Note, *Contribution and Indemnity Between Joint Tortfeasors*, 45 HARV. L. REV. 349 (1931); Note, *Contribution Between Persons Jointly Liable in Tort*, 35 GEO. L. J. 382 (1947); Note, *Contribution and Indemnity Among Tortfeasors in Minnesota*, 37 MINN. L. REV. 470 (1953); Comment, *The Rule Against Contribution and its Status in Nebraska*, 37 NEB. L. REV. 820 (1958); Note, *Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases*, 68 YALE L. J. 964 (1959).

⁸RESTATEMENT OF RESTITUTION § 102 (1937).

⁹PROSSER, *supra* note 2, § 47 at 275.

ing contribution among wrongdoers of concurrent negligence, has stifled an equitable principle.

The general doctrine that one of several persons equally situated who has been compelled to bear more than his equitable share of a common burden is entitled to contribution from the others who have borne less than their respective shares has been subjected to a general qualification in cases where the common burden is a joint liability of such persons as tortfeasors or wrongdoers. In the absence of a statute in the particular jurisdiction governing the right, it has been frequently declared judicially that as among or between joint wrongdoers or tortfeasors there can be no contribution, and that one of several persons who become liable to another for a wrong cannot enforce contribution from his co-wrongdoers although he is compelled to discharge the whole or more than his share of such liability. This broad proposition is usually, in the absence of statute, asserted as the general rule, although it is doubtless more accurate to regard it as a general exception to the established rules allowing contribution.¹⁰

III. ORIGIN OF THE RULE

How did the common law give birth to this exceptional doctrine prohibiting contribution among joint tortfeasors? It is generally recognized that the rule had its origin in the 1799 case of *Merriweather v. Nixan*.¹¹ In this case there had been an action for conversion and a joint judgment against two defendants who had acted in concert in committing the tort. One of the two defendants, who had been levied upon for the whole judgment, sought contribution from the other on the theory of an implied promise, "as for such money paid his use." Lord Kenyon dismissed the action in contribution stating that he had never heard of such an action when the former judgment was for a tort. The ground of his decision appears to have been simply that the parties had acted intentionally and in concert. Therefore, the plaintiff's claim of contribution was a result entirely of his own deliberate wrong.

In the celebrated Highwayman's Case, *Everett v. Williams*,¹² there was a suit by one highwayman against another for an account of their plunder. The aftermath of that case was so disastrous for both parties and the plaintiff's solicitors that it could have very well discouraged

¹⁰18 AM. JUR. 2d, *Contribution* § 33 (1965).

¹¹8 Term. Rep. 186, 101 Eng. Rep. 1337 (1799).

¹²Ex. 1725, reported in 1893, 9 L.O. Rev. 197 and Costigan's Cases on Legal Ethics, p. 399 (1917).

anyone from seeking a right of contribution for all time. The bill was dismissed with costs to be paid by the defendant, but the plaintiff's solicitors were attached and fined fifty pounds each for contempt. Both the plaintiff and the defendant were subsequently hanged.

In 1894 the question of contribution was raised in an English case of concurrent negligence, and contribution was allowed.¹³ Contribution is now permitted by statute in England.¹⁴

Prosser observes that the early American cases applied the rule against contribution in cases of wilful misconduct but refused to apply it where the tort committed by the claimant was a matter of negligence or mistake.¹⁵ Apparently, as the law relating to joint tortfeasors evolved in this country, the origin of the rule in the old English cases and the early American cases was completely ignored. The limitations of the rule to cases involving intentional torts was soon forgotten.

The great majority of our courts proceeded to apply it generally, and refused to permit contribution even where independent, although concurrent, negligence had contributed to a single result. Over a period of more than a century, only nine American jurisdictions have come to the contrary conclusion, allowing contribution without legislation: the District of Columbia, Iowa, Louisiana, Maine, Minnesota, Nevada, Pennsylvania, Tennessee, and Wisconsin.¹⁶

In *Best v. Yerkes*¹⁷ the Iowa court recognized that a majority of jurisdictions do not distinguish between "intentional" and "unintentional" torts in applying the principle of no contribution. However, this court adopted the minority rule:

These authorities seem to us to overlook the fundamental basis for denying recovery over, either by way of indemnity or contribution; that is, that the intentional wrongdoer is not entitled, as a matter of public policy, to the aid of the law in adjusting any claims against his confederate, his collaborator in causing a deliberate and planned injury to a third party. This was the reason for the rule adopted in *Merryweather v. Nixon*, *supra*. But this reason fails when the tort committed against the third party was due to inadvertence, without any intent to the part of the tort-feasors to injure him. Consequently, we

¹³*Palmer v. Wick and Pultneytown Steamshipping Co.*, [1894] A.C. 318.

¹⁴WILLIAMS, *JOINT TORTS AND CONTRIBUTORY NEGLIGENCE*, §§ 25-54 (1951).

¹⁵PROSSER, *supra* note 2, § 47.

¹⁶*Id.*

¹⁷247 Iowa 800, 77 N.W.2d 23 (1956).

conclude that the minority rule which permits contribution or indemnity in negligence cases had the firmer foundation.¹⁸

IV. STATUTORY RIGHT OF CONTRIBUTION

Although only nine American jurisdictions have allowed contribution without legislation, twenty-five states have now enacted legislation permitting that right.¹⁹ Of those states only South Dakota, Pennsylvania, New Mexico, Maryland, Hawaii, Rhode Island, Arkansas and Delaware have adopted the Uniform Contribution Among Tortfeasors Act. The other legislation states have adopted a variety of statutes.²⁰ The states of New York, Missouri, Michigan, West Virginia, Kansas, Texas, as well as Mississippi, provide for the right of contribution only when a joint judgment has been entered.

Unfortunately the Mississippi statute does little to rectify the inequities of the common law rule. Tortfeasors against whom a joint

¹⁸*Id.* at 28. The tortfeasor contribution question became the subject of a debate among legal periodical authors. James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941); Jones, *Contribution Among Tortfeasors*, 11 U. FLA. L. REV. 175 (1958). The James article led to the debate: Gregory, *Contribution Among Joint Tortfeasors: A Defense*; James, *Replication*; Gregory, *Rejoinder*, all in 54 HARV. L. REV. 1170 (1941).

¹⁹ARK. STAT. ANN. §§ 34-1001 to -1009 (1962); CAL. CIV. PRO. CODE § 875 (West Supp. 1971); DEL. CODE ANN. tit. 10 §§ 6301-08 (1953); GA. CODE ANN. § 105-2012 (1968); HAWAII REV. LAWS §§ 663-11 to -16 (1968); KAN. STAT. ANN. § 60-2413 (1964); KY. REV. STAT. § 412.030 (1969); LA. CODE CIV. PRO. ANN. arts. 1111-1116 (1960); MD. ANN. CODE art. 50 § 16-24 (1968); MASS. GEN. LAWS ANN. ch. 231 §§ 1-4 (Supp. 1968); MICH. STAT. ANN. § 27A.2925 (1962); MISS. CODE ANN. § 335.5 (1956); MO. REV. STAT. § 537.060 (1949); N. J. REV. STAT. §§ 2A:53A-1 to -5 (1951); N. M. STAT. ANN. §§ 24-1-11 to -18 (1953); N. Y. CIV. PRAC. § 1401 (McKinney Supp. 1971); N.C. GEN. STAT. § 1B-1 (1969); N.D. CENT. CODE §§ 32-38-01 to -04 (1960); PA. STAT. tit. 12 § 2082-89 (1967); R.I. GEN. LAWS ANN. §§ 10-6-1 to -11 (1969); S.D. CODE §§ 15-8-11 to -22 (1967); TEX. REV. CIV. STAT. ANN. art. 2212 (1964); VA. CODE ANN. § 8-627 (1957); W. VA. CODE ANN. §§ 55-7-12 to -13 (1966); WIS. STAT. §§ 113.01 to .05 (1957).

²⁰VA. CODE ANN. § 8-627 (1957) provides: Contribution among wrong doers may be enforced when the wrong is a mere act of negligence and involved no moral turpitude.

GA. CODE ANN. § 105-2012 (1968) provides the right of contribution:

(1) where the tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if they had been jointly sued. (2) If judgment is entered jointly against several trespassers, and is paid off by one, the others shall be liable for contribution.

N.J. REV. STAT. § 2A:53A-1 to -5 (1951) provides simply that the right of contribution exists among joint tortfeasors.

N.C. GEN. STAT. § 1B-1 (1969) provides that "there is a right of contribution among them even though judgment has not been against all or any of them."

judgment has been rendered generally pay their pro rata share of the judgment if all tortfeasors are solvent or insured. It is only when one of the defendants is unable to pay that the plaintiff forces the judgment to be paid entirely by one solvent or insured tortfeasor. In that event, the defendant who was required to pay the full amount of the judgment has a right of contribution under our statute. That right is purely academic since the other defendant was insolvent or uninsured.

Texas has a contribution statute which is very similar to that of Mississippi. However, the appeals court in Texas quickly recognized the uselessness of a limited contribution statute and refused to give it a narrow interpretation. In *Lottman v. Cuilla*²¹ suit was instituted by the plaintiff for personal injuries sustained from a fall on a defective sidewalk in front of certain property belonging to the individual defendant in Houston, Texas. The individual defendant attempted to join the City of Houston as a party defendant, but the lower court sustained a demurrer by the city. The appeals court held that the lower court erred in sustaining that demurrer. Although the court observed that the general principal of "no contribution" among joint tortfeasors had been recognized in Texas until the Act of 1917,²² the court interpreted the statute as follows:

This clearly recognizes the principle of enforced contribution amongst joint tort-feasors, thus changing the common-law rule upon that subject. It is true literally the statute applies to judgments rendered against two or more wrongdoers. But the evident purpose of the fact was to relieve the rigor of the common law, so as to place the burden, as amongst themselves, equally upon all the solvent tort-feasors. There is no reason to hold the Legislature meant to exclude from the benefits of the statute those cases where, as here, the plaintiff did not elect to sue all the tort-feasors; but every consideration impels us to hold that the defendant sued may, and should be allowed to, bring in other wrongdoers, provided he does so in such way as not to delay or otherwise prejudice the plaintiff's case.²³

²¹288 S.W. 123 (Texas 1926).

²²TEX. REV. CIV. STAT. ANN. art. 2212 (1964) states:

Any person against whom, with one or more others, a judgment is rendered in any suit on an action arising out of, or based on tort, except in causes wherein the right of contribution or of indemnity, or of recovery over, by and between the defendants is given by statute, or exists under the common law, shall, upon payment of said judgment, have a right of action against his codefendant or codefendants and may recover from each a sum equal to the proportion of all of the defendants named in said judgment rendered to the whole amount of said judgment.

²³*Lottman v. Cuilla*, 288 S.W. 123, 126 (Texas 1926).

It would have been an easy matter for the Texas court to avoid the responsibility for dealing with the basic inequities of that problem by simply stating that the statute was in derogation of the common law and should be strictly construed. Of course, Mississippi has the additional problem of no third party practice. However, the Mississippi Supreme Court could emulate the attitude of the Texas court in *Lottman* and look to the basic intent of section 335.5. It is significant that the preamble to Senate Bill No. 322, which later became section 335.5 of the Code, includes: An act to provide for the contribution between joint tortfeasors or persons jointly or severally liable to judgment.²⁴ Perhaps this language indicates that the legislature did not intend a limited change in the common law rule.

V. THE RULE AND MISSISSIPPI

One of the great "trademarks" of the legal system in this country has been its adherence to common law rules. This system has proved to be the best compromise between stability and change. It has been the very fabric of our society. In recent years there has been much criticism of our courts for sacrificing the stability of tradition in favor of changes which are somewhat radical. However, there have been occasions when the courts impeded orderly progress by hesitation to crack the shell of tradition in their interpretation of common law rules. As this mistake is multiplied over the decades, the shell is hardened, and the rule becomes even less flexible. Perhaps this explains the stubborn persistence of the common law principle against contribution among joint tortfeasors. A few courts, such as the District of Columbia in *Knell v. Feltman*,²⁵ have resisted this trend. The plaintiffs were guest passengers of an automobile, owned and operated by Knell, which was involved in a collision with a taxicab owned and operated by Feltman. The plaintiffs filed suit against Feltman. Feltman filed a third party complaint against Knell. Knell appealed on the theory that there could be no contribution among joint tortfeasors before a judgment was rendered. After discussing the basic inequities of the rule which would prohibit contribution, the court observed:

We conclude that when a tort is committed by the concurrent negligence of two or more persons who are not intentional wrongdoers, contribution should be enforced; that a joint judgment against such tortfeasors is not a prerequisite to contribution between them, and it is immaterial whether they were, or

²⁴Gen. Laws Miss., ch. 259 (1952).

²⁵174 F.2d 662 (D.C. Cir. 1949).

any of them was, personally negligent . . . that when the parties are not intentional and wilful wrongdoers, but are made so by legal inference or intendment, contribution may be enforced.²⁶

Unfortunately the Mississippi Supreme Court has never been called upon to question the basis for the common law rule as it relates to tortfeasors. The rule apparently has never been directly challenged in Mississippi. In *Klaas v. Continental Southern Lines, Inc.*²⁷ judgments were entered against joint tortfeasors, a bus company and truck owner, before passage of section 335.5.²⁸ The plaintiff forced payment entirely from the defendant bus company *after* the statute was passed, and the defendant bus company sought contribution against the defendant truck owner. The court held that the legislature did not intend for the

²⁶*Id.* at 665. The court, discussing the rule, observed:

In addition to being balked by Rule 14(a), the appellant's theory that there can be no contribution unless the plaintiff has first obtained a judgment against both wrongdoers is untenable for still another reason. The right to seek contribution belongs to the tort-feasor who has been forced to pay, and the existence of the right cannot logically depend upon a selection of defendants made by the plaintiff. If it did so depend, the caprice or whim of the plaintiff, or his deliberate intention to fasten liability on one defendant alone, could preclude that defendant from having contribution to which he might otherwise be entitled. Moreover, such an application of the contribution doctrine would open the way to collusion between a plaintiff, and one against whom he has a cause of action, to impose liability solely upon another against whom he has a cause of action for the same wrong.

For these reasons, we see no substance in the suggestion that contribution between concurrent tort-feasors can be enforced only if both are judgment debtors of the plaintiff.

. . . .

Due to the brevity of the report and a misleading headnote, the Merryweather case has often been cited in support of the sweeping proposition that no contribution can be had between joint tort-feasors. It is plain, however, that the ruling of the case was limited to the denial of contribution between wilful or intentional wrongdoers.

Nevertheless, after a period of adherence to the true Merryweather holding, the majority of American courts have long flatly said that there can be no contribution between joint or concurrent tort-feasors, without distinguishing between those who are intentional wrongdoers and those whose unpurposed negligence results in a tort.

Widespread revulsion against that rule, which Chief Justice Groner said "is not sustainable upon any fair basis of reasoning, is wrong, and should be overruled," was demonstrated when the legislatures of some fifteen states enacted alleviating statutes in one form or another. Dissatisfaction with the rule is further shown by the fact that many courts have 'riddled it with exceptions.' [*Id.* at 666 (footnotes omitted).]

²⁷225 Miss. 94, 82 So. 2d 705 (1955).

²⁸Miss. CODE ANN. § 335.5 (1956), *see app. 1, infra.*

statute to apply retroactively and refused contribution. In its decision the court observed:

Before Chap. 259 was passed, there was in Mississippi no right in joint tort feors to obtain contribution between themselves. . . . Although this might be regarded as an exception to the general rule allowing contribution, we think that this principle, *irrespective of its merits or defects if it were being considered as an original question*, was a part of the substantive law of the state prior to the passage of Chap. 259. . . . The effect of the statute was to create rights which did not exist before. And it destroyed a valid defense to an action available before the enactment of the statute. . . . It took away a substantive right, a valid defense, and created a right in a joint tort feor who had paid the entire judgment.²⁹ (Emphasis added.)

One wonders whether or not the supreme court intended to leave the principle open to debate if it were directly attacked and "being considered as an original question." Nevertheless, it has not been considered as an "original question," since the *Klaas* decision and other supreme court decisions have simply affirmed the common law rule.

In *Thomas v. Rounds*³⁰ an ambulance belonging to Thomas and driven by his employee was involved in a collision, causing injury to the plaintiff. Thomas complained that the judgment was entered only against him and not against his servant, the ambulance driver, who was a joint defendant. The court held:

Tort-feors are jointly and severally liable, and are not entitled to contribution between themselves.³¹

In *Mississippi Cent. Ry. v. Roberts*³² a wrongful death action was brought against the railroad and a school bus driver for injury and death of bus passengers caused by a collision at the railroad crossing. The jury verdict sought to apportion damage between the railroad and the bus driver. The court refused to accept the apportionment. The jury again retired and returned a joint verdict. The defendant railroad objected to the acceptance of the joint verdict and moved for a mistrial. The supreme court affirmed the joint verdict, stating:

We have already stated that the facts reasonably interpreted in the light of the verdict disclose a case of concurrent negligence on the part of both defendants, and it has long been the settled substantive law that, in such cases, when the concurrent negli-

²⁹*Klaas v. Continental Southern Lines, Inc.*, 225 Miss. 94, 82 So. 2d 705 (1955).

³⁰161 Miss. 713, 137 So. 894 (1931).

³¹*Id.* at 718, 137 So. at 894.

³²173 Miss. 487, 160 So. 604 (1935).

gence produces a single, indivisible injury, both the defendant tort-feasors are equally liable for the entire damage sustained. In the absence of a statute expressly so authorizing, there is no apportionment or contribution between them.³³

In *Teche Lines, Inc. v. Pope*³⁴ a passenger filed suit against a railroad and bus company for injuries sustained in a train-bus collision at the railroad crossing. The court granted a peremptory instruction for the railroad and a verdict was entered against the bus company. The greatest portion of the bus company's argument on appeal was directed at the action of the court in granting a peremptory instruction for the railroad. The court held:

The railroad company was made a joint defendant and the greater part of the argument of appellant is directed at the alleged error of the trial court in granting a peremptory instruction in behalf of the railroad company. If there were any error in that respect, the plaintiff, appellee, only would be entitled to complain of it. Even if the railroad company were liable, it would be as a joint tort-feasor, and it is firmly settled in this state that joint tortfeasors are equally liable and that there is no apportionment or contribution between them.³⁵

Of course, the federal courts in Mississippi have necessarily followed the rule. In *Gulf & S.I. Ry. v. Gulf Refining Co.*³⁶ a wrongful death action was filed originally against Gulf Refining Co. and the railroad on the basis that the defendants mistakenly shipped a drum of gasoline to certain parties who had ordered kerosene. Supposing the gasoline to be kerosene, the plaintiffs used the fuel for illuminating purposes; the gasoline caused an explosion, killing two persons. Before trial the oil company was dismissed; a verdict against the railroad was returned. The railroad filed an action against Gulf Refining Co. for "indemnity and contribution." The court, refusing to permit contribution, stated:

Where a party wronged has compelled any one of the parties chargeable with the act to compensate him for the injury, the general rule is that the person thus singled out and compelled to bear the loss cannot recover against the others equally liable. . . .

[W]here the negligence of the parties has been of the same character no indemnity or contribution will be allowed.³⁷

³³*Id.* at 505-06, 160 So. at 606-07.

³⁴175 Miss. 393, 166 So. 539 (1936).

³⁵*Id.* at 401-02, 166 So. at 541.

³⁶260 F. 262 (S.D. Miss. 1919). See also *Standard Oil Co. of Ky. v. Illinois Cent. R.R.*, 421 F.2d 201 (5th Cir. 1969).

³⁷260 F. at 265.

VI. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT

In 1939 the Commissioners on Uniform Laws responded to nationwide problems involving contribution among tortfeasors with a Uniform Act.³⁸ The original Uniform Contribution Among Tortfeasors Act of 1939 was revised in 1955 and designated:

An Act concerning contribution among tortfeasors, release of tortfeasors, procedure enabling recovery of contribution, and making uniform the law with reference thereto.³⁹

The commissioners note explains that a primary purpose of the revision of the 1939 Act was to eliminate the definition of "joint tortfeasors."⁴⁰ That term is no longer used. This was done to eliminate possible confusion arising from the fact that in some jurisdictions the term "joint tortfeasors" refers only to those who can be joined as defendants in an action.

The 1955 Revised Act also states that an action for contribution must be brought within one year after final judgment is obtained against the party seeking contribution.⁴¹ In the absence of such judgment, the right of contribution is barred unless the tortfeasor seeking contribution (1) has discharged by payment the common liability within the statute of limitations applicable to the claimant's cause of action or the statute of limitations applicable to the claimant's cause of action or (2) agreed while action was pending to discharge the liability and has begun action for contribution within one year of the agreement.⁴²

It is noteworthy that the first paragraph of both the original act and revised act eliminates the "joint judgment" limitation of the Mississippi Act:

[T]here is a right of contribution among them even though judgment has not been recovered against all or any of them.⁴³

It must be remembered that the essential prerequisite to the right of contribution is that it ". . . exists only in favor of a tortfeasor who has paid more than his pro-rata share of the common liability and his

³⁸UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1939 version), 9 U.L.A. 233 (1957).

³⁹UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1955 version), 9 U.L.A. 127 (Supp. 1967).

⁴⁰*Id.* § 1, Commissioners' Note.

⁴¹*Id.* § 3 (c).

⁴²*Id.* § 3 (d).

⁴³*Id.* § 1 (a).

total recovery is limited to the amount paid by him in excess of his pro rata share."⁴⁴

The Revised Act denies the right of contribution to any tortfeasor who has intentionally (wilfully or wantonly) caused or contributed to an injury or wrongful death.⁴⁵

It also specifies that the liability insurer of a joint tortfeasor may be subrogated to the insured's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro-rata share of the common liability.⁴⁶ The Act provides that the action will not extend to breaches of trust or of other fiduciary obligations.⁴⁷

Section 2 provides for enforcement of the right of contribution in the original action in which the common liability is fixed or by separate action. Since Mississippi law does not presently permit third party practice, the "separate action" procedure would be the only remedy available even if the Uniform Act were adopted. At present, the third party practice of the federal courts is useless in a contribution case, since the substantive law of Mississippi does not permit that right. Hopefully, Mississippi will soon adopt a third party practice. Although some delay in trial is caused when a defendant is permitted to file a third party claim, a multiplicity of actions could be avoided, thereby minimizing the tendency to further congest trial dockets. This post judgment procedure in the Uniform Act is based upon the New York Statute. The Commissioners observe that it appears to have worked very well, and no serious objection has developed. The Commissioners note that it seems consistent with good practice to authorize contribution problems to be tried out, after adjudication of the plaintiff's claim, among the defendants over whom the court has acquired jurisdiction in the original action.⁴⁸

One of the most troublesome areas of contribution remedies is the effect of a release or covenant not to sue as it relates to three relationships: plaintiff to the tortfeasor in settlement, plaintiff to remaining tortfeasors, and as between tortfeasors. Sections 4 and 5 of the 1939 Act described the effects of a release. In the commissioners' note for the 1955 Act, it was observed that section 5 of the 1939 Act provided that a release of any tortfeasor should not release him from liability for

⁴⁴*Id.* § 1 (b).

⁴⁵*Id.* § 1 (c).

⁴⁶*Id.* § 1 (e).

⁴⁷*Id.* § 1 (g).

⁴⁸*Id.* § 2, Commissioners' Note.

contribution unless it expressly provided for reduction "to the extent of the pro-rata share of the released tortfeasor" of the injured person's recoverable damages. This provision has been one of the chief causes of complaint and one of the main objections to its adoption where the Act has been adopted. The purpose of section 5 of the 1939 Act was to discharge collusion between the plaintiff and a released tortfeasor against the one not released. However, the effect of that provision was to discourage settlements. The commissioners observed:

It seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit. Accordingly the subsection provides that the release in good faith discharges the tortfeasor outright from all liability for contribution.⁴⁹

VII. CONCLUSION

It is apparent that a policy of unlimited contribution among tortfeasors is not without problems, particularly with regard to procedure for enforcement. However, the inequities of the common law rule demand a change. Whenever a court or legislative body is confronted with a proposal to abolish or radically modify a long standing rule of law, it must understandably move with caution. Nevertheless, the principles of natural justice should be the controlling factors. The general rule permitting contribution among joint obligors is the epitome of natural justice. There is no reason to exempt one wrongdoer and oppressively burden another at the whim or caprice of the plaintiff simply because tort liability, as contrasted with general obligations, is involved.

It is unlikely that the Mississippi Supreme Court will have this issue presented as "an original question." Even then, the court would probably defer the matter to statutory alteration. The legislature should confront this problem with major statutory surgery in the form of the Uniform Contribution Among Tortfeasors Act. Jurisdictions throughout the country have recognized this problem and have dealt with it, occasionally by judicial decree, but more frequently by legislative enactment. Hopefully, our lawmakers will soon join this trend.

APPENDIX I

§ 335.5. Contribution between joint tortfeasors.

In any action for damages where judgment is rendered against two (2) or more defendants, jointly and severally, as joint tortfeasors, the defendants against whom such a judgment is rendered shall share equally

⁴⁹*Id.* § 4, Commissioners' Note.

the obligation imposed by such judgment, and if one (1) of such defendants pays an amount greater than the total sum of the judgment divided by the number of defendants against whom the judgment was rendered, then the other defendants shall be jointly and severally liable to him for the amount so paid in excess of his proportionate part; provided that no defendant shall be liable to any other defendant for more than his proportionate share of the original judgment.

Provided further, that in determining, for the purpose of the above contribution, the number of defendants against whom the judgment has been rendered, an employer and his employee, or a principal and his agent, shall be considered as one (1) defendant when the liability of such employer or principal has been caused by the wrongful or negligent act or commission of his employee or agent.

Provided further, that the liability of such defendants against whom such a judgment has been rendered shall be joint and several as to the plaintiff in whose favor such judgment has been rendered.

APPENDIX II

UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT

An Act concerning contribution among tortfeasors, release of tortfeasors, procedure enabling recovery of contribution, and making uniform the law with reference thereto.

1955 REVISED ACT

Sec.

1. Right to Contribution.
2. Pro Rata Shares.
3. Enforcement.
4. Release or Covenant Not to Sue.
5. Uniformity of Interpretation.
6. Short Title.
7. Severability.
8. Repeal.
9. Time of Taking Effect.

Be it enacted

§ 1. [Right to Contribution].—(a) Except as otherwise provided in this Act, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tortfeasor who has intentionally [wilfully or wantonly] caused or contributed to the injury or wrongful death.

(d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(e) A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

(f) This Act does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

(g) This Act shall not apply to breaches of trust or of other fiduciary obligation.

§ 2. [Pro Rata Shares].—In determining the pro rata shares of tortfeasors in the entire liability (a) their relative degrees of fault shall not be considered; (b) if equity requires the collective liability of some as a group shall constitute a single share; and (c) principles of equity applicable to contribution generally shall apply.

§ 3. [Enforcement].—(a) Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.

(b) Where a judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

(c) If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after appellate review.

(d) If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has either (1) discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment, or (2) agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution.

(e) The recovery of a judgment for an injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution.

(f) The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

§ 4. [Release or Covenant Not to Sue].—When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

§ 5. [Uniformity of Interpretation].—This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it.

§ 6. [Short Title].—This Act may be cited as the Uniform Contribution Among Tortfeasors Act.

§ 7. [Severability].—If any provision of this Act or the application thereof to any person is held invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application and to this end the provisions of this Act are severable.

§ 8. [Repeal].—All acts or parts of acts which are inconsistent with the provisions of this Act are hereby repealed.

STUDENT COMMENTS

EQUAL MUNICIPAL SERVICES FOR THE OTHER SIDE OF THE TRACKS

INTRODUCTION

The impetus of equality must blindly travel down every road in every community.

Most people are conscious of a neighborhood in their city or community characterized as "the other side of the tracks."¹ It may be a large urban ghetto or a cluster of shanty houses in a small town. Such areas are often easily identified by poor social conditions. The environment may consist of poverty, ignorance, disease, crime, unemployment, despair, and humiliation.

A town or city cannot eliminate all the social problems in impoverished areas, but what is the legal duty of a municipality to provide equal services² to *all* residential areas? People do not always receive the services to which they are entitled in a democracy. Poor and racial minority residents are often invisible to public officials, both visually and politically.

An enormous gulf in communications prevails between local officials and these residents; it perpetuates a sense of powerlessness in their communities. Citizens are profoundly isolated and alienated from the processes and programs of government.³ Recent history vividly demonstrates the disaster that can result from such alienation. The frustration of unresolved grievances by ghetto residents against local authorities foreshadowed the urban violence in the summer of 1967.⁴ Residents had little confidence in the willingness and ability of local government to respond to their grievances.⁵

¹Circuit Judge Tuttle, in *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971) observed that "[r]eferring to a portion of town or a segment of society as being 'on the other side of the tracks' has for too long been a familiar expression to most Americans." 437 F.2d at 1287. The *Shaw* decision, a service equalization suit, is discussed throughout this Comment.

²"Municipal services" in this Comment includes benefits generally conferred on municipal residents without regard to a user tax or special assessment, such as street and sidewalk paving, street lighting, sanitation service, and police and fire protection.

³REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 148-49 (1968).

⁴*Id.* at 147.

⁵*Id.*

City officials have broad administrative discretion in the distribution of vital services. Although the municipality has an interest in providing services to all its citizens for reasons of health, safety, and general welfare, municipalities often fail in this duty. When the failure affects a particular class of citizens, however, the issue is removed from the realm of administrative responsibility of the municipality and propelled into the courts.

The problem of the inadequacy of municipal services encompasses more than the narrow issue of living on unpaved, improperly lighted streets and receiving insufficient sanitation service, police and fire protection. It is a complex of legal, ethnic, economic, and social problems which permeate modern society. These problems cannot be resolved exclusively in the courts, but the law can serve as a viable force to encourage solutions and, at least, insure equality in the provision of services.

Expansion of equal protection to municipal services has created a new egalitarian frontier for disadvantaged persons. This Comment will explore the emergence of the right to equal services and the judicial dimensions of that right.

I. HAWKINS V. TOWN OF SHAW:⁶ A NEW ASSAULT ON INEQUALITY

Hawkins v. Town of Shaw emerges as a landmark decision in attacks on racial discrimination. Establishing a precedent for future municipal service equalization suits, the Fifth Circuit Court of Appeals found that the town of Shaw had discriminated against its black residents in the provision of street paving, sewers, water mains, fire hydrants, and street lights. Injunctive relief was ordered to eliminate the disparities between the black and white residents.

The town of Shaw, Mississippi, is located in the Mississippi Delta and has a population of approximately 2500 persons. Black residents compose sixty percent of the population. Residential racial segregation is almost total. Only three percent of the black homes are located in white neighborhoods. Revealing a definite pattern of inferior services in the black neighborhoods of Shaw, the plaintiffs' statistics were extremely convincing. At the time of trial almost ninety-eight percent of the homes that fronted on unpaved streets were occupied by blacks; only three percent of the white residents lived on unpaved streets.

Ninety-nine percent of the white community were served by a sanitary sewer system, while twenty percent of the black residents were

⁶437 F.2d 1286 (5th Cir. 1971).

unserved entirely. The white residents were provided underground storm sewers and a continuous system of drainage ditches for surface water drainage; black neighborhoods had only a poorly maintained system of drainage ditches or none at all.

The white community was favorably provided a disproportionate percentage of the street light fixtures, but more importantly they received all of the modern mercury vapor street lights. Seventy-seven percent of the street lights in the white neighborhoods were the modern type, while not a single new fixture had been installed in a black neighborhood. There was no aberration of this pattern in the provision of traffic control signs, adequate water mains, and fire hydrants; white residents were consistently favored.

The conditions in Shaw confronted the court with the issue of whether to condemn such degrading inequalities in the provision of municipal services. After an independent appraisal of the evidentiary effects of racial discrimination in Shaw, the Fifth Circuit reversed the district court's dismissal of the complaint and ordered relief for Shaw's black residents. The court's application of the fourteenth amendment's equal protection clause covers essentially any municipal service financed by general revenues. Although not an issue in *Shaw*, suits in larger cities will probably involve disparities in such traditional services as sanitation collection and police and fire protection.

Hawkins v. Town of Shaw is the center of a whole constellation of constitutional issues relating to the appropriate standard of equal protection review, bases of discrimination, statistical proof, discriminatory intent, and relief. The impact of *Shaw* cannot yet be determined, but it is certain to be a historical precedent. Cases which descend from *Shaw* will inevitably attempt to broaden its dimensions and formulate a solid, coherent approach for equalizing municipal services in all towns and cities.

II. STANDARDS OF EQUAL PROTECTION REVIEW

The unequal provision of municipal services produces an "under-inclusive" classification by denying one class of persons the same benefits as those similarly situated.⁷ Judicial scrutiny of under-inclusive classifications embraces a dual standard of equal protection review. Justification for the unequal treatment of persons similarly situated must satisfy a requisite judicial standard, but determination and application of the

⁷See Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 348 (1949).

appropriate standard is often an enigma to the courts. The compositions, justifications, and limits of the two approaches⁸ promulgated by the Supreme Court are different. Judicial review of equal protection cases under the *traditional standard* is limited and restrained. Conversely, the *strict standard* of review is more active and protective of personal rights. The question of which standard to apply in municipal service equalization suits is a critical issue, and the choice made by the courts will determine the future of such suits.

A. The Traditional Standard

Permitting unequal treatment of persons under the traditional standard, the courts require that "[t]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."⁹ The courts attempt to balance legislative freedom and equality. The traditional standard sacrifices some equality and fairness¹⁰ as illustrated by Professors Tussman and tenBroek in their classic analysis on equal protection:

The equal protection of the laws is a "pledge of the protection of equal laws." But laws may classify. And "the very idea of classification is that of inequality." In tackling this paradox the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a *doctrine of reasonable classification*.

[T]he Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.¹¹ (Emphasis added.)

The Supreme Court has consistently applied the traditional standard to equal protection claims involving economic and regulatory matters,¹²

⁸The two approaches to equal protection scrutiny have been distinguished by various names such as the reasonable classification doctrine and the "suspect" classification doctrine, the permissive approach and the restrictive approach, restrained review and active review, and even the old standard and the new standard. This Comment will refer to the approaches as the traditional standard and the strict standard.

⁹F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

¹⁰Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1086 (1969).

¹¹Tussman and tenBroek, *The Equal Protection of the Laws*, *supra* note 7, at 344.

but there is no similar history of its application to personal rights. In each of these cases the Court upheld the challenged state economic regulation.¹³ *Morey v. Doud*¹⁴ is the only case since the 1930's in which the Supreme Court invalidated a business regulation under the equal protection clause of the fourteenth amendment.¹⁵ Such a historical background of judicial restraint in the traditional approach suggests a policy of constitutionally permitting substantially all economic and regulatory action by state and local governments. The traditional approach does not require strict scrutiny of a municipality's conduct. It would permit any conduct that classified or distinguished among the residents, provided that such conduct be *rationaly* related to a legitimate governmental objective. The danger of its application to municipal service equalization suits is evidenced by the district court's erroneous application in *Hawkins v. Town of Shaw*. Dismissing the complaint, the court stated:

If actions of public officials are shown to have rested upon *rational considerations*, irrespective of race or poverty, they are not within the condemnation of the Fourteenth Amendment, and may not be properly condemned upon judicial review. Persons or groups who are treated differently must be shown to be similarly situated and their unequal treatment demonstrated to be *without any rational basis* or based upon an invidious factor such as race.¹⁶ (Emphasis added.)

Although confronted with undisputed statistical evidence of racial disparity, the above statement by the district court illustrates that a court will go far in allowing a classification to stand by attributing it to at least a conceivable purpose, though perhaps not the most probable.¹⁷ The degree of justification for inequality will depend upon the court's "imaginative powers and its devotion to a theory of judicial

¹²See, e.g., *Martin v. Walton*, 368 U.S. 25 (1961) (per curiam) (attorneys maintaining out-of-state offices); *McGowan v. Maryland*, 366 U.S. 420 (1961) (sale of certain goods on Sunday); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (opticians); *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220 (1949) (operation of undertaking business); *REA v. New York*, 336 U.S. 106 (1949) (advertising vehicles); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (women bartenders); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947) (river pilots).

¹³Cases cited note 12 *supra*.

¹⁴354 U.S. 457 (1957) (selling money orders).

¹⁵Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula"*, 16 U.C.L.A. L. REV. 716, 722 (1969) [hereinafter cited as Karst].

¹⁶*Hawkins v. Town of Shaw*, 303 F. Supp. 1162, 1168 (N.D. Miss. 1969), *rev'd*, 437 F.2d 1286 (5th Cir. 1971).

¹⁷Note, *Developments in the Law—Equal Protection*, *supra* note 10, at 1080.

restraint.”¹⁸ The district court in *Shaw* justified the disparities by a finding of “rational considerations” inferred from “legitimate deductions,”¹⁹ thus purporting to satisfy the traditional standard of equal protection. By applying the traditional standard the court erroneously applied a standard consistently used in economic regulation cases²⁰ and erroneously placed the burden upon the plaintiffs to demonstrate that the unequal treatment was “without any rational basis.”²¹

B. The Strict Standard

Constitutional justification for racial or economic status classifications demands more than a “reasonable basis” as required by the traditional standard of equal protection review. Recognizing the need for application of the strict standard in *Hawkins v. Town of Shaw*, the Fifth Circuit Court of Appeals reversed the district court’s dismissal and undertook an independent appraisal of the evidence adduced at the trial level.

The strict standard of review for equal protection claims has developed two branches: (1) classifications based on “suspect” criteria, such as race or wealth and (2) classifications which infringe upon “fundamental” rights. Judicial review under either branch subjects classifications “to the most rigid scrutiny”²² and requires more than a mere demonstration of a rational relationship between the classification and some legitimate state purpose. The strict standard demands “a very heavy burden of justification”²³ and imposes upon the state the burden of demonstrating “a compelling governmental interest.”²⁴

1. *Suspect Classifications.* Racial²⁵ and economic²⁶ distinctions are the only clear and continuously recited “suspect” classifications. Distinctions involving lineage,²⁷ residency,²⁸ disadvantaged political minori-

¹⁸*Id.*

¹⁹303 F. Supp. at 1168.

²⁰See cases cited note 12 *supra*.

²¹303 F. Supp. at 1168.

²²*Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (classification infringing on a “fundamental” right); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (classification based on a “suspect” criterion).

²³*Loving v. Virginia*, 388 U.S. 1, 9 (1967).

²⁴*Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

²⁵See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

²⁶See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

²⁷*Levy v. Louisiana*, 391 U.S. 68 (1968).

²⁸*Shapiro v. Thompson*, 394 U.S. 618 (1969).

ties,²⁹ members of the armed forces,³⁰ women,³¹ students,³² and minor children³³ have received special attention by the Court, but not always rigid judicial scrutiny. The great solicitude of the courts has been for racial minorities and the poor because of their susceptibility to oppression and abuse. Judge J. Skelly Wright in *Hobsen v. Hansen*,³⁴ persuasively explained the necessity of the suspect branch of the strict standard:

[The] additional scrutiny of practices which . . . fall harshly on [disadvantaged] groups relates to the judicial attitude toward legislative and administrative judgments. Judicial deference to these judgments is predicated in the confidence courts have that they are just resolutions of conflicting interest. This confidence is often misplaced when the vital interest of the poor and of racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political processes, not so much because of the chance of outright bias, but because of the abiding danger that the power structure—a term which need carry no disparaging or abusive overtones—may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. These considerations impel a closer judicial surveillance and review of . . . judgments adversely affecting racial minorities, and the poor, than would otherwise be necessary.³⁵

The intensity of judicial scrutiny for racial classifications has been perpetually rigid. Five years after passage of the fourteenth amendment, the Supreme Court emphasized that state-imposed racial discrimination “was the evil to be remedied” by the equal protection clause.³⁶ In 1886 a leading case, *Yick Wo v. Hopkins*,³⁷ held that the unequal and unjustified application of a city ordinance by public officials denied Chinese aliens equal protection of the laws. The ordinance was not unconstitutional per se, but became so in its application to a particular racial group.³⁸

²⁹*Williams v. Rhodes*, 393 U.S. 23 (1968).

³⁰*Carrington v. Rash*, 380 U.S. 89 (1965).

³¹*Reed v. Reed*, 92 S.Ct. 251 (1971); *Goesaert v. Cleary*, 335 U.S. 464 (1948). U.S. 464 (1948).

³²*Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

³³*In re Gault*, 387 U.S. 1 (1967).

³⁴269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

³⁵*Id.* at 507-08.

³⁶*Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81-82 (1873). More recently, see *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 724 (1961).

³⁷118 U.S. 356 (1886).

³⁸*Id.* at 373.

Chief Justice Stone foreshadowed the suspect branch of the strict standard of review in his famous "footnote four" in *United States v. Carolene Products Co.*³⁹ He announced that classifications resulting from "prejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry."⁴⁰ *Korematsu v. United States*⁴¹ in 1944 firmly established that racial classifications are "immediately suspect" and subject "to the most rigid scrutiny."⁴² Recent Supreme Court decisions have continuously acknowledged and echoed this theme in equal protection claims based on race.⁴³

In *Hawkins v. Town of Shaw* the complaint alleged discrimination on the basis of race and poverty, but on appeal the poverty discrimination argument was abandoned.⁴⁴ The propriety of an economic status suit, however, is supported by tenable authority. The inclusion of wealth as a suspect classification has been described as "[t]he new status of indigence . . . [reflecting] the turning of America's conscience from the narrow problems of Negro rights to a wider recognition of the disadvantaged position of the poor of all races."⁴⁵ Justice Jackson in *Edwards v. California*⁴⁶ recognized the invidious classification founded upon wealth in his concurring opinion. His concurrence based on the fourteenth amendment, Justice Jackson stated:

[A] man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. "Indigence" in itself is neither a source of rights nor a basis for denying them. The mere state of being without

³⁹304 U.S. 144 (1938).

⁴⁰*Id.* at 152 n. 4.

⁴¹323 U.S. 214 (1944).

⁴²*Id.* at 216.

⁴³*E.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967), wherein the Court observed that racial classifications are not entirely forbidden, but must be justified by some "legitimate overriding purpose" independent of race. The racial distinction is required to be supported by more than a mere rational connection to the alleged purpose. *Id.* at 11.

McLaughlin v. Florida, 379 U.S. 184 (1964) declared:

[A state law which classifies persons by race] even though enacted pursuant to a valid state interest, bears a heavy burden of justification, . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy. *Id.* at 196.

⁴⁴437 F.2d at 1287 n. 1.

⁴⁵*The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91, 180 (1966).

⁴⁶314 U.S. 160 (1941). The majority opinion in *Edwards*, based on the commerce clause, held that a state's police power did not permit it to exclude indigent immigrants from the state.

funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color.⁴⁷

In *Skinner v. Oklahoma*⁴⁸ Justice Douglas explicitly began to lay the doctrinal foundation for the new egalitarian basis in constitutional law.⁴⁹ Although not a classification based expressly on wealth, the Court held invalid a state sterilization law for persons convicted three times for specific crimes, exempting white-collar crimes. The law made “as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.”⁵⁰

In the area of criminal law, the Court has held that a person’s rights and claim to equal protection of the laws cannot be predicated on his financial ability to pay for justice and equality.⁵¹ *Harper v. Virginia Board of Elections*,⁵² declaring the poll tax unconstitutional, became “the first case outside the criminal area to place indigency on a level with race as a closely protected category under the equal protection clause.”⁵³ It is now clear that “lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored”⁵⁴ and subject to the strict standard of equal protection review.

The foregoing discussion illustrates that the current state of the law is ripe for municipal service equalization suits based on racial and economic discrimination. Sub-standard provision of municipal services is not limited to racial minorities. Poverty is colorblind. Future service equalization suits should give economic status independent recognition in the courts.⁵⁵ The initial suits in this new area, however, will probably be more successful with the racial discrimination argument. Two reasons support this prediction. First, as a suspect classification, race has a longer and more incandescent history of special judicial scrutiny

⁴⁷*Id.* at 184-85.

⁴⁸316 U.S. 535 (1942).

⁴⁹Karst, *supra* note 15, at 735.

⁵⁰316 U.S. at 541.

⁵¹*E.g.*, *Tate v. Short*, 401 U.S. 395 (1971), held that a state statute which permitted conversion of a fine to imprisonment for persons willing but unable to pay, while limiting punishment to payment of a fine for persons able to pay, violated the equal protection clause; *Douglas v. California*, 372 U.S. 353 (1963), required states to provide counsel for an indigent appealing his case; *Griffin v. Illinois*, 351 U.S. 12 (1956), required states to provide a free transcript to indigent criminal defendants seeking an appeal.

⁵²383 U.S. 663 (1966).

⁵³*The Supreme Court, 1965 Term, supra* note 45, at 178.

⁵⁴*Harper v. Virginia Bd. of Elections*, 383 U.S. at 668.

⁵⁵Abascal, *Municipal Services and Equal Protection: Variations On A Theme By Griffin v. Illinois*, 20 HASTINGS L. J. 1367, 1383 (1969).

and intervention. Secondly, it is easier to prove discrimination based on the color of a man's skin than that based on the amount of money in his pockets.

2. *Fundamental Rights*. The second branch of the strict standard requires that state action impairing "fundamental" rights also be subjected to rigid scrutiny and demonstrate some compelling state interest as justification. Rights⁵⁶ which have received special attention under the equal protection clause include procreation,⁵⁷ marriage,⁵⁸ divorce,⁵⁹ fairness in the criminal process,⁶⁰ equal education,⁶¹ voting,⁶² interstate travel,⁶³ and an illegitimate child's right to wrongful death damages for the mother.⁶⁴ The Court has no general formula for defining rights as "fundamental."⁶⁵ Cases are treated on an ad hoc basis, but each usually involves some possibility of detriment to the complaining party.⁶⁶ Detriment may occur when an individual is not treated equally with others, or detriment may occur if his treatment falls below an absolute, minimal standard.⁶⁷ "The selection [of fundamental interests] to date has been largely . . . interests that carry high priorities for the development of the nation's undeveloped sectors."⁶⁸

*Skinner v. Oklahoma*⁶⁹ represents the innovational foundation for the fundamental rights branch of the strict standard. This development has been described as:

[A] classification that discriminates with respect to a right of very great importance is not to be sustained merely because the classification has a rational basis; if the state fails to supply a

⁵⁶Other rights not included in the list are protected by other provisions of the Constitution. See Note, *Developments in the Law—Equal Protection*, *supra* note 10, at 1128.

⁵⁷*Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁵⁸*Loving v. Virginia*, 388 U.S. 1 (1967).

⁵⁹*Boddie v. Connecticut*, 401 U.S. 371, 383 (1971) (Douglas, J., concurring).

⁶⁰*E.g.*, *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁶¹*E.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁶²*E.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁶³*Shapiro v. Thompson*, 394 U.S. 618 (1969).

⁶⁴*Levy v. Louisiana*, 391 U.S. 68 (1968).

⁶⁵Note, *Development in the Law—Equal Protection*, *supra* note 10, at 1130.

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸Karst and Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 58.

⁶⁹316 U.S. 535 (1942). Justice Douglas described the right to procreation as "one of the basic rights of man," and a classification that subjects certain persons to sterilization requires strict scrutiny by the courts.

substantial justification, its discrimination is invidious and unconstitutional.⁷⁰

Recent cases suggest that "the doctrinal seed planted nearly three decades ago in *Skinner* has come to full flower. And each new flowering provides seeds for the future."⁷¹ There are still undefined areas in the amorphous category of fundamental rights.

Is the provision of municipal services or, at least, the *equal* provision of services by a municipality a fundamental right? One analogy can be made to school desegregation cases involving municipal educational facilities. Considering equal protection principles established in these cases,

[i]t need only be asked whether dirty, filthy streets, unlit at night, beckoning the criminal, awash during winter storms, engender in those who live in such under-serviced areas "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." [Citing *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).]⁷²

Living in a democracy should entitle all persons to certain basic protections and provisions. Police and fire protection are vitally important to the preservation of life and property. Adequate streets, street lights, sewers, and fire hydrants are similarly important. The inadequacy of these and other services immediately creates an environment of health and safety hazards. Any provision of unequal or inferior services which may result in the serious loss of "life, liberty, or property" should precipitate strict scrutiny by the courts.⁷³ In *Shapiro v. Thompson*⁷⁴ the Supreme Court observed that the welfare residency requirement, which violated the equal protection clause, denied the plaintiffs "food, shelter, and other necessities of life."⁷⁵ Fundamental fairness demands broad application of the *Brown v. Board of Education* principle to municipal services.

⁷⁰Karst, *supra* note 15, at 735.

⁷¹*Id.* at 736. See generally *Shapiro v. Thompson*, 394 U.S. 618 (1969), and *Levy v. Louisiana*, 391 U.S. 68 (1968), for cases which represent the flowering of this concept.

⁷²Abascal, *Municipal Services and Equal Protection: Variations On A Theme By Griffin v. Illinois*, *supra* note 55, at 1388.

⁷³Ratner, *Inter-Neighborhood Denials of Equal Protection in the Provision of Municipal Services*, 4 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 1, 19 (1968) [hereinafter cited as Ratner].

⁷⁴394 U.S. 618 (1969).

⁷⁵*Id.* at 627.

A municipality is not constitutionally required to provide services. Just as the electoral process and the criminal process are provided and regulated by the government, however, municipal services have become basic governmental responsibilities.⁷⁶ The modern city dweller perceives these services as absolute necessities in a municipal environment. Once a municipality undertakes the provision of services, the equal distribution of those services becomes a fundamental right.⁷⁷

A service equalization suit premised upon deprivation of fundamental rights approaches the issue of substantive due process.⁷⁸ Analogous to this topic is the "new property" concept for recipients of welfare benefits. No state is required to provide public assistance; but once the state establishes a welfare program, the "benefits are a matter of statutory entitlement for persons qualified to receive them."⁷⁹ Any infringement on a person's participation in the provision of vital governmental services must be carefully scrutinized by the courts. Scrutiny of municipal services as a new fundamental right should be conducted under the equal protection clause, not the due process clause. Equal protection will ostensibly encompass more rights articulated as fundamental.⁸⁰

3. *Interaction of the Two Branches.*

The more the victims of legislative classification appear to be disadvantaged, the less need there is for the interest to be basic. So also the judiciary can be expected to give "close scrutiny" to the alleged invasion of a right it regards as fundamental,

⁷⁶Ratner, *supra* note 73, at 22.

⁷⁷Cf. *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218 (1964). In *Griffin* the constitution and laws of Virginia provided a state system of public schools. The closing of a school in one county while maintaining schools in all other counties violated the equal protection clause.

⁷⁸Fessler and Haar, *Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 441, 463 (1971) [hereinafter cited as Fessler and Haar].

⁷⁹*Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). See also *Boddie v. Connecticut*, 401 U.S. 371 (1971). *Boddie* held that the due process clause of the fourteenth amendment required that indigents have equal access to divorce courts, which the state provided and monopolized, without requiring payment of court cost and fees.

⁸⁰"Probably every interest found to be fundamental and therefore protected by the due process clause will also be fundamental under the equal protection clause," however, the converse does not appear to be true. Some equal protection rights will not be regarded as fundamental under the due process clause. Note, *Developments in the Law—Equal Protection*, *supra* note 10 at 1130. "Reliance on equal protection rather than on due process would seem to open a wider range of activities to constitutional scrutiny." Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 438-39 (1967).

even when the claimant's assertion that he is disadvantaged is less than persuasive.⁸¹

Both branches of the strict standard must be recognized independently in service equalization suits. As a classification becomes less invidious under a suspect criterion (*e.g.*, few blacks or poor persons) the need is greater for judicial recognition of municipal services as a fundamental right. Conversely, reluctance by the courts to acknowledge municipal services as fundamental will necessitate a strong demonstration of a suspect classification. A suit which alleges the presence of suspect criteria *and* the fundamental right to municipal services will be strengthened and probably evoke special scrutiny more easily. The vanguard of this proposition is represented by landmark cases⁸² which appear to be based on both branches of the strict standard.

It should be noted, however, that the fundamental right and economic status approaches to the strict standard may employ recondite limitations. The Supreme Court can refuse to regard the equal provision of municipal services as a fundamental right, independently deserving strict review. In *Dandridge v. Williams*⁸³ the Court recently intimated that fundamental rights must be found in the Constitution.⁸⁴ Furthermore, a review of equal protection claims based on economic status will similarly reveal that the indigent plaintiffs were also subjected to an impairment of a constitutionally protected interest, or at least an interest that is "of the essence of a democratic society."⁸⁵ This pattern is reflected in the recent case of *Boddie v. Connecticut*,⁸⁶ wherein the Supreme Court avoided the equal protection clause in providing relief to poor persons when a constitutional right was not involved. The Court held that the due process clause of the fourteenth amendment, not the equal protection clause, required that indigents have free and equal access to divorce courts.⁸⁷ *Dandridge* and *Boddie* may limit expansion

⁸¹Karst, *supra* note 15, at 744-45.

⁸²*See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969) (suspect criterion of wealth and fundamental right to travel); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (suspect criterion of wealth and fundamental right to vote). Interestingly, as an alleged fundamental right, education cases have also involved the racial element. Note, *Developments in the Law—Equal Protection*, *supra* note 10 at 1129.

⁸³397 U.S. 471 (1970).

⁸⁴*Id.* at 484-86.

⁸⁵*Reynolds v. Sims*, 377 U.S. 533, 555 (1964). *Cf.* *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Griffin v. Illinois*, 351 U.S. 12 (1956). *See also* *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁸⁶401 U.S. 371 (1971).

⁸⁷*Id.* *See* cases cited note 79 *supra*. *See also* *Shapiro v. Thompson*, 394 U.S. 618, 659-63 (1969) (Harlan, J., dissenting). *But see* *Boddie v. Connecticut*, 401 U.S. 371, 383-89 (1969) (Douglas & Brennan, JJ., concurring).

of service equalization suits on any independent basis other than race. Precedent, however, favors recognition of the expanding rights of the poor and equality in municipal services as a fundamental right, but the Supreme Court must ultimately proclaim the independence of these principles.

III. EVIDENTIARY BURDENS

The construction of a *prima facie* case in future service equalization suits should compromise between precise proof of discrimination and unjustified municipal discretion. While the original burden of introducing evidence rests with the plaintiffs, a statistical demonstration of sufficient disparities should establish a *prima facie* case by removing the element of discrimination from mere speculation and bringing it within the realm of legitimate inference.⁸⁸ An evidentiary demonstration that municipal services are provided disproportionately to one class of residents presumes discriminatory practice and effect. The *prima facie* case shifts the evidentiary burden to the defendants and should not be defeated because of claims of municipal discretion or mere denials of discriminatory intent.⁸⁹ If the statistics are undisputed, the defendant municipality is required to show that its action and subsequent effects were brought about for reasons other than discrimination.⁹⁰ The court should be precluded from judicial "presumptions of regularity and constitutionality which would normally assist the defendant in the discharge of his burden of affirmative response."⁹¹ The defendant's rebuttal must consist of positive proof.⁹²

A. Statistical Evidence

As early as 1881 the Supreme Court emphatically acknowledged the establishment of a *prima facie* case of racial discrimination by statistical evidence.⁹³ In recent years the Court has insisted that evidence of

⁸⁸Fessler and Haar, *supra* note 78, at 447.

⁸⁹See *Labat v. Bennett*, 365 F.2d 698, 719 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967).

⁹⁰See *Patton v. Mississippi*, 332 U.S. 463, 466 (1947).

⁹¹Fessler and Haar, *supra* note 78, at 448. In seeking to escape the inference of a *prima facie* case of racial discrimination in *Hawkins v. Town of Shaw*, the district court considered "all legitimate *deductions* to be made from the evidence running counter to statistical racial disparity." 303 F. Supp. at 1168 (emphasis added).

⁹²See *Whitus v. Georgia*, 385 U.S. 545, 552 (1967).

⁹³*Neal v. Delaware*, 103 U.S. 370, 397 (1881). See *Patton v. Mississippi*, 332 U.S. 463 (1947), for a leading Supreme Court precedent on the use of statistical evidence to prove racial discrimination.

statistical disparities be directly confronted by the defendant's proof.⁹⁴ Recognizing the use of statistics to demonstrate a prima facie case of racial discrimination in such areas as jury selection,⁹⁵ voter registration,⁹⁶ and education,⁹⁷ the Fifth Circuit Court of Appeals has noted that "figures speak and when they do, Courts listen."⁹⁸ If a plaintiff's "allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration," that the municipality is engaged in racially discriminatory practices which deprive one class of residents of certain benefits and privileges.⁹⁹

Irrespective of race, the Supreme Court has enunciated the principle of statistical proof in the area of fundamental rights. Applying the equal protection clause to the legislative reapportionment case of *Reynolds v. Sims*,¹⁰⁰ the Court observed that "the resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically."¹⁰¹

Courts which intervene in the area of municipal services face the difficult problem of deciding standards of impermissible classifications and quantitative and qualitative levels of services. For example, a complaint alleging racial discrimination must establish two points simultaneously. First, the plaintiffs must demonstrate that they constitute a racially identifiable group; secondly, they must show that they receive an inferior quantity or quality of services. These points, not being entirely severable, must have a standard or perhaps separate standards by which to evaluate the claim. At what statistical point can the court determine that (1) a particular racial group is discriminated against and (2) the quantitative and qualitative levels of disparities are impermissible? Because of overwhelming numerical disparities, *Hawkins*

⁹⁴E.g., *Whitus v. Georgia*, 385 U.S. 545, 552 (1967); *Coleman v. Alabama*, 389 U.S. 22, 23 (1967); *Avery v. Georgia*, 345 U.S. 559, 562-63 (1963).

⁹⁵E.g., *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967).

⁹⁶E.g., *Alabama v. United States*, 304 F.2d 583 (5th Cir. 1962), *aff'd*, 371 U.S. 37 (1962).

⁹⁷E.g., *United States v. Board of Education of City of Bessemer*, 396 F.2d 44 (5th Cir. 1968).

⁹⁸*Brooks v. Beto*, 366 F.2d 1, 9 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967).

⁹⁹*Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960).

¹⁰⁰377 U.S. 533 (1964).

¹⁰¹*Id.* at 563.

v. Town of Shaw represents an extreme situation and provides few concrete answers for courts in future suits.¹⁰²

"Equality" within the context of quantitative and qualitative standards presents several problems. Will the courts seek a minimal standard of adequate services or the more ambitious standard of absolute equality?¹⁰³ The Fifth Circuit's opinion in *Shaw* suggests that a suit based on suspect criteria will require absolute equality in the provision of services, regardless of whether services in the favored communities are excessive or insufficient.¹⁰⁴ The *Shaw* decision does not mention a minimal standard of entitlement, but the need to determine the dimensions of such a standard may arise in a fundamental rights argument.¹⁰⁵ The minimal standard is also highly conducive to the argument that *many poor or black neighborhoods may require, not merely equal, but more services.*¹⁰⁶ Conditions in some neighborhoods, for example, necessitate more frequent garbage collection; high crime areas deserve more street lighting and police protection. The focal point of the minimal standard of entitlement is obviously "need."

Courts will be enlightened by other areas of civil rights litigation, but ultimately they must determine desirable standards for the purpose of ascertaining impermissible disparities and providing relief. Alternately, future service equalization suits may develop standards on an individual basis.

B. Discriminatory Intent

Inequality in the receipt of municipal services will generally not be the result of overt discrimination but will assume the form of benign neglect. Although several Supreme Court decisions have announced that administrative action denies equal protection only when intentionally

¹⁰²The problem at the lower end of the spectrum is illustrated by *Swain v. Alabama*, 380 U.S. 202 (1965). In a jury selection case, the Court held:

[P]urposeful discrimination based on race alone is not satisfactorily proved by showing that an identifiable group in the community is underrepresented by as much as 10%. . . . The overall percentage disparity has been small, and reflects no studied attempt to include or exclude a specific number of Negroes. . . . We do not think that the burden of proof was carried by petitioner in this case. [*Id.* at 208-09.]

¹⁰³Fessler and Haar, *supra* note 78, at 461.

¹⁰⁴*Id.* at 462.

¹⁰⁵*Id.* at 462-63.

¹⁰⁶Ratner, *supra* note 73, at 42-43.

discriminatory,¹⁰⁷ a number of decisions have found discrimination from criteria other than direct examination of motivation.¹⁰⁸ In *Yick Wo v. Hopkins*¹⁰⁹ a statistical pattern of unequal and oppressive administrative discretion created a legitimate inference of de facto racial discrimination.¹¹⁰

Proof of an actual intent to discriminate is no longer a tenable requirement in establishing a prima facie case. "It is not necessary to go so far as to establish ill will, evil motive, or absence of good faith" in future equal protection claims.¹¹¹ Municipal thoughtlessness and inaction coupled with a historical pattern of inferior services introduces a ground for heightened judicial concern.¹¹² Rather than explore intent or motive in service equalization suits, courts should review the unequal effect of municipal policies;¹¹³ otherwise, de facto discriminatory conduct may sufficiently prevail.

C. *Compelling State Interest*

The presence of a prima facie case shifts the burden of proof to the defendants, and under the strict standard of review the defendants must demonstrate a *compelling* state interest as justification for an otherwise impermissible classification or distinction.¹¹⁴ A classification that fails to demonstrate a compelling state interest constitutes an "invidious" discrimination against the persons affected.¹¹⁵ A moderate amplification of this principle explains its balancing aspect:

This higher burden [of proof] requires that a state show not only that its objective could not be attained by a measure

¹⁰⁷See, e.g., *Swain v. Alabama*, 380 U.S. 202, 205 (1965); *Snowdon v. Hughes*, 321 U.S. 1, 8 (1944).

¹⁰⁸Note, *Developments in the Law—Equal Protection*, *supra* note 10, at 1098.

¹⁰⁹118 U.S. 356 (1886).

¹¹⁰*Id.* at 373-74.

¹¹¹*United States ex rel. Seals v. Wiman*, 304 F.2d 53, 65 (5th Cir. 1962), *cert. denied*, 372 U.S. 915 (1963); *accord*, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

¹¹²*Fessler and Haar*, *supra* note 78, at 460; *see e.g.*, *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967); *Norris v. Alabama*, 294 U.S. 587, 596-98 (1935).

¹¹³*Cf. Griffin v. Illinois*, 351 U.S. 12 (1956); *Hobsen v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). These two cases illustrate the discriminatory effect of "non-discriminatory" policies.

Similarly, in *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218 (1964) and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Supreme Court focused on the actual effect of legislative enactments, not upon the intent or motivation behind the enactments. *See Palmer v. Thompson*, 403 U.S. 217, 224-26 (1971).

¹¹⁴*E.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

¹¹⁵*Id.* at 633.

which did not draw [impermissible] distinctions, but also that the public interest involved outweighs the detriments that will be incurred by the affected private parties.¹¹⁶

The public interest of protection of the fisc,¹¹⁷ administrative efficiency,¹¹⁸ social goals¹¹⁹ and safety¹²⁰ have failed to survive the heavy burden of justification. The scales are necessarily "balanced" in favor of those disadvantaged by the classification. Theoretically, a plethora of public necessity will dislodge the scales and shift the balance in favor of the municipality. Although not impossible, the task is extremely difficult.

Recognizing that justification for the extreme disparities in the town of Shaw was even more difficult, the Fifth Circuit "determined that no compelling state interests can possibly justify the discriminatory results of Shaw's administration of municipal services."¹²¹

D. Special Problems

The disparities in the town of Shaw were especially vulnerable to a service equalization suit because all municipal services were financed by general revenue. Many municipalities, however, finance local improvements such as the construction of streets and sewers by levying special assessments against the property benefited.¹²² This policy requires only the property enjoying the benefit to bear the expense.¹²³ *Hawkins v. Town of Shaw* leaves this problem unresolved in municipalities which levy special assessments for specific services. Special assessments may ultimately be another manifestation of discrimination on the basis of wealth which poor persons simply cannot afford. This is especially true when the assessment is for only part of the cost or the municipality engages in a matching funds policy. In any event, the effect of an adverse court decision in this area may be limited in communities where most poor or black residents rent their homes. A special assessment is a charge against the land, not the tenant, and is generally secured by a lien on the property.¹²⁴

¹¹⁶Note, *Developments in the Law—Equal Protection*, *supra* note 10, at 1103.

¹¹⁷*Palmer v. Thompson*, 403 U.S. 217, 226 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

¹¹⁸*Shapiro v. Thompson*, 394 U.S. 618, 633-34 (1969).

¹¹⁹*See Levy v. Louisiana*, 391 U.S. 68 (1968).

¹²⁰*Palmer v. Thompson*, 403 U.S. 217, 226 (1971).

¹²¹*Hawkins v. Town of Shaw*, 437 F.2d 1286, 1292 (5th Cir. 1971).

¹²²14 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* §§ 38.11, 38.12, 38.24 (3rd ed. 1970).

¹²³*Id.* at § 38.11.

¹²⁴*Id.* at §§ 38.08, 38.161.

Modifications of municipal policy which "freeze in" the results of past discrimination is another problem confronting the courts. A new policy, skillfully comprised of equality, providing services to all *new* sections of a municipality on a non-discriminatory basis is insufficient if it continues to underservice older, disfavored sections. Similarly, any new finance policy for municipal services that shifts the revenue source from the general fund to special assessments is unacceptable if its effect perpetuates discriminatory conditions.¹²⁵ The Fifth Circuit in *Hawkins v. Town of Shaw* stated:

[A] relationship otherwise rational may be insufficient in itself to meet constitutional standards—if its effect is to freeze-in past discrimination.¹²⁶

Courts have expressly rejected "neutral" policies, which apparently apply equally to everyone, but have the inevitable effect of cloaking injustices of the past with a shield of present rights.¹²⁷

IV. RELIEF

A. Section 1983

It is an established principle that courts will not review municipal policy or discretion unless it appears unconstitutional, unreasonable, or unnecessarily oppressive. Except under these circumstances, it is the duty of the courts to uphold municipal enactments and judgments.¹²⁸ Since *Ex Parte Young*¹²⁹ suits against state and county officials to enjoin them from invading constitutional rights are not forbidden by the eleventh amendment. The Supreme Court has specifically declared that "the equal protection clause reaches the exercise of state power however manifested," including power exercised by cities, towns, or counties.¹³⁰

The most obvious cause of action for a service equalization suit will be found in the Civil Rights Act of 1871.¹³¹ Under 42 U.S.C. § 1983 any

¹²⁵Fessler and Haar, *supra* note 78, at 461.

¹²⁶437 F.2d at 1290 *citing* Henry v. Clarksdale Municipal Separate School Dist., 409 F.2d 682, 688 (5th Cir. 1969).

¹²⁷*See, e.g.,* United States v. Louisiana, 380 U.S. 145, 155-56 (1965); Henry v. Clarksdale Municipal Separate School Dist., 409 F.2d 682, 688 (5th Cir. 1969), *cert. denied*, 396 U.S. 940 (1969).

¹²⁸*See, e.g.,* Dalehite v. United States, 346 U.S. 15, 43 (1953); City of St. Paul v. Chicago, St. P., M. & O. Ry. Co., 413 F.2d 762, 767 (8th Cir. 1969), *cert. denied*, 396 U.S. 985 (1969). Botsford v. City of Norman, 354 F.2d 491, 494 (10th Cir. 1965).

¹²⁹209 U.S. 123 (1908).

¹³⁰Avery v. Midland County, 390 U.S. 474, 479-80 (1968).

¹³¹42 U.S.C. § 1983 (1964) provides:

Every person who, under color of any statute, ordinance, regulation, custom,

person deprived of his constitutional rights by state or local officials has remedies available in federal court. A person may seek the federal remedy irrespective of the availability of a state remedy.¹³² Section 1983 will effectively reach municipal officers acting within their official capacities, but many suits simultaneously seek to enjoin the municipality itself. The need for enjoining the municipal corporation is unclear, and even the propriety of a § 1983 suit against a city or town is unsettled.

In *Hawkins v. Town of Shaw* the plaintiffs joined the town as a defendant. The district court dismissed the town as a party, concluding that "injunctive relief was not obtainable against a municipal corporation under § 1983."¹³³ Reversing the district court, the Fifth Circuit enunciated that "[t]he Town of Shaw, indeed any town, is not immune to the mandates of the Constitution."¹³⁴

In *Monroe v. Pape*¹³⁵ the Supreme Court refused to consider a municipality a "person" within the meaning of § 1983 in a suit for damages. This decision clearly leaves any alteration of municipal liability for damages in a § 1983 action to Congress¹³⁶ or future judicial interpretation.¹³⁷ Unlike *Monroe*, *Hawkins v. Town of Shaw* was a class action seeking injunctive relief. The Fifth Circuit¹³⁸ and other courts of appeals¹³⁹ have held that a municipality is a "person" under

or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

¹³²E.g., *McNeese v. Board of Education*, 373 U.S. 668, 671-72 (1962); *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961); *Moreno v. Henckel*, 431 F.2d 1299, 1305-07 (5th Cir. 1970).

¹³³303 F. Supp. at 1163 n. 1.

¹³⁴437 F.2d at 1292.

¹³⁵365 U.S. 167 (1961).

¹³⁶Note, *The Municipality, Section 1983 and Pendent Jurisdiction*, 5 VAL. U. L. REV. 110, 112-13 (1970).

¹³⁷The U.S. Court of Appeals for the District of Columbia recently held the District as a municipality liable for the torts of its policemen in a suit for damages under § 1983. The court interpreted the Supreme Court ruling in *Monroe v. Pape* as not permitting a § 1983 suit for damages against a municipality only when the municipality has been clothed in immunity by its parent state. *Carter v. Carlson*, 447 F.2d 358, 368-70 (D.C. Cir. 1971).

¹³⁸E.g., *Moreno v. Henckel*, 431 F.2d 1299, 1309 (5th Cir. 1970); *Harkless v. Sweeny Independent School District*, 427 F.2d 319 (5th Cir. 1970); see *Franklin v. City of Marks*, 439 F.2d 665 (5th Cir. 1971); *United States v. City of Jackson*, 318 F.2d 1, 10-11 (5th Cir. 1963).

¹³⁹E.g., *Garren v. City of Winston Salem*, 439 F.2d 140 (4th Cir. 1971); *Dailey v. City of Lawton*, 425 F.2d 1037, 1038 (10th Cir. 1970); *Schnell v. City of Chicago*, 407

§ 1983 for the purpose of equitable relief. Although the Supreme Court has not expressly considered the issue, it has permitted relief under § 1983 against school districts and officials,¹⁴⁰ state prison wardens,¹⁴¹ and state election officials¹⁴² without any limitation of equitable remedies. The Court has also ordered declaratory and injunctive relief against municipalities in civil rights cases¹⁴³ without questioning the propriety of enjoining a municipality under § 1983. These cases tend to negate the town of Shaw's theory that absolute immunity is necessary to protect the municipal fisc from possible contempt fines for actions by public officials who may violate the injunctive relief granted by a court.¹⁴⁴

Municipal immunity in law and equity under § 1983 will not obstruct effective redress of constitutional violations; municipal officials are expressly brought within the proscription of § 1983. In any event, the present weight of authority in several federal courts of appeals demonstrates that injunctive relief under § 1983 is available against a municipality as well as its officials.

B. The Role of the Court

Determining effective relief for plaintiffs in service equalization suits is a complex task that weighs heavily upon the institutional limitations of the courts. Judicial involvement in foreign areas is not novel. Although a certain presumption of competency in special areas should be given to certain bodies of government, courts cannot be excluded from difficult areas.¹⁴⁵ Once it is demonstrated that the Constitution

F.2d 1084, 1086 (7th Cir. 1969); *Adams v. City of Park Ridge*, 293 F.2d 585, 587 (7th Cir. 1961); *Sellers v. Johnson*, 163 F.2d 877, 880, 883 (8th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

Other courts of appeals have recognized the right to equitable relief against municipalities. *See e.g.*, *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970); *Lewis v. City of Grand Rapids*, 356 F.2d 276 (6th Cir. 1966), *cert. denied*, 385 U.S. 838 (1966); and numerous school desegregation cases.

¹⁴⁰*E.g.*, *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503 (1969).

¹⁴¹*E.g.*, *Rinaldi v. Yeager*, 384 U.S. 305 (1966).

¹⁴²*E.g.*, *WMCA v. Lomenzo*, 377 U.S. 633 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

¹⁴³*See e.g.*, *Watson v. City of Memphis*, 373 U.S. 526 (1963); *Turner v. City of Memphis*, 369 U.S. 350 (1962).

¹⁴⁴Brief for Defendant-Appellee at 48, *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971).

¹⁴⁵Adhering to judicial policies advocated by the defendants in *Hawkins v. Town of Shaw*, the district court observed that "[municipal services] is a field in which courts should be reluctant to enter because of their incompetence." 303 F. Supp. at 1169.

has been violated, the courts should enter any area to provide relief. The school desegregation and legislative reapportionment cases illustrate judicial supervision in complex areas.¹⁴⁶

The Fifth Circuit in *Hawkins v. Town of Shaw* respected the principles of federalism and separation of powers by directing the town to formulate a plan to eliminate the disparities in services "within a reasonable time."¹⁴⁷ Early judicial history had not authorized delays in vindication of constitutional rights, but the school desegregation cases injected this principle into the matter of relief.¹⁴⁸ Most familiar is the *Brown v. Board of Education* decree that school desegregation proceed "with all deliberate speed."¹⁴⁹ If municipalities act in good faith when ordered to formulate and implement service equalization plans, the propriety of judicial deference in this area is obvious. If the municipality fails to produce a satisfactory plan, the plaintiffs or the court must develop one.¹⁵⁰

Development of a proper remedial plan by a municipality may create many problems. Among the most prevalent problems will be the municipality's financial ability to implement an equalization order. Without increased revenue, either from a tax increase or special state or federal assistance, a municipality may be financially incapable to extend services to newly developed areas, continue to repair and improve presently favored areas, and simultaneously equalize services in the disfavored areas. Courts may find it necessary to preclude a municipality from extending and improving services in new or favored areas until the disfavored areas are equalized. Such a decree should be exercised wisely and cautiously by the court, but it is a tenable remedy in financially burdened municipalities.

CONCLUSION

A major obstacle to future service equalization suits is the physical barrier of preparing a prima facie case, especially in medium and large cities. The high financial cost and many hours required to prepare a case may vitiate laudable efforts. It is virtually impossible to survey an entire large city to ascertain the quantitative and qualitative levels

¹⁴⁶Note, *Discriminations Against the Poor and the Fourteenth Amendment*, *supra* note 80, at 443.

¹⁴⁷437 F.2d at 1293.

¹⁴⁸Note, *Developments in the Law—Equal Protection*, *supra* note 10, at 1137.

¹⁴⁹349 U.S. 294, 301 (1954).

¹⁵⁰See generally Note, *Developments in the Law—Equal Protection*, *supra* note 10, at 1141-54.

of services, as well as determine the ethnic and economic composition of every neighborhood and community. Compared with the town of Shaw, such an endeavor would be radically complex. Perhaps one solution is random sample proof for larger cities. Statisticians could insure the accuracy of probability in making the random samples and evaluate the comprehensive results.

The road toward elimination of the "other side of the tracks" has been a morass of inertia. The slow emergence of municipal service equalization actions may be attributed to several factors. Most people view the "other side of the tracks" as a perpetual fact of American life. The issue has not presented itself as a crisis demanding immediate attention. Unequal provision of municipal services is not a causal social problem, but rather a manifestation of the more demanding problems. Civil rights and legal aid attorneys have, therefore, concentrated their efforts on voting rights, school desegregation, welfare rights, job discrimination, and housing. While achievements in these areas will strengthen efforts to equalize services, the present inequality may persist for years. Denial of equal municipal services is a badge of slavery as surely as is denial of equal education or the right to vote.

Municipalities can no longer remain complacent toward underserved areas. *Hawkins v. Town of Shaw* demonstrates the propriety of enforcing the right to equal services for disfavored residents. *Shaw* and its descendants may prompt a genuine crusade by municipalities to rectify policies of providing unequal services.

Kenneth W. Barton

EDITORS NOTE: *Hawkins v. Town of Shaw* (No. 29013) was granted a rehearing before the Fifth Circuit, and the case was argued en banc on October 19, 1971. No decision had been rendered when this comment went to press.

JUDICIAL SELECTION AND TENURE IN MISSISSIPPI

I

[In Mississippi] we do not in truth have a wholly elected judiciary but substantially an appointive one by the Governor, a political figure who has no assistance from the Bar Association or any other professional group nor any control by lawyer-oriented groups for these appointments.¹

Although the Mississippi Constitution of 1890 purportedly abolished gubernatorial or legislative appointment of judges by providing for their popular election, the Mississippi judiciary continues to be composed largely of individuals appointed by the governor to fill judicial vacancies. The *Report of the Mississippi Judiciary Commission to the 1970 Regular Session of the Legislature of the State of Mississippi* revealed that between the years 1948 and 1971 Mississippi governors filled 68 unexpired or newly created judgeships² under the authority of

¹REPORT OF THE MISSISSIPPI JUDICIARY COMMISSION TO THE 1970 REGULAR SESSION OF THE LEGISLATURE OF THE STATE OF MISSISSIPPI, at 66 [hereinafter cited as REPORT]. GEN. LAWS MISS. ch. 312 (1968) created the Mississippi Judiciary Commission and charged it with conducting "... a complete survey of the judicial system of Mississippi and ... obtain[ing] statistical information with reference to case loads of the various courts in Mississippi; conduct[ing] research relating to improvement of the judicial system in the State ... and [making] a comprehensive study of the judicial system ... for the purpose of the improvement thereof." On January 6, 1970, the Commission's REPORT, containing the results of its survey and its recommendations for the improvement of the administration of justice in Mississippi, was submitted to the 1970 Regular Session of the Mississippi legislature. For a condensed version of the REPORT, see Payne, *Mississippi Judiciary Commission—A Synopsis*, 41 MISS. L.J. 22 (1969).

²REPORT, *supra* note 1, at 66. The 68 appointments breakdown as follows:

Term	Supreme Court	Circuit Court	Chancery Court	County Court	Total Appts.
1948-51	5	1	5	0	11
1952-55	2	1	8	5	16
1956-59	0	1	2	4	7
1960-63	3	4	5	0	12
1964-67	1	2	6	4	13
1968-71	0	3	3	3	9

These figures do not include special appointments during the disability of a sick or aging judge, which in most cases would give the candidate who has served as special judge a distinct advantage at the polls, almost as if he had been an incumbent. Glenn R. Winters, executive director of the American Judicature Society, has observed that "judges once appointed to office are almost invariably retained in office at the next election. In any election the incumbent has a heavy advantage, and especially an incumbent who has recently had the specific endorsement of the state's highest-ranking government official." Winters, *One-Man Judicial Selection*, 45 J. AM. JUD. SOC'Y 198, 199 (1962).

section 177 of the Mississippi Constitution of 1890.³ The appointments of Chancellor R. P. Sugg to fill the unexpired term of the late Chief Justice William N. Ethridge and Mrs. Lenore Prather to fill Justice Sugg's vacated chancellorship are the most recent exercises of the governor's appointive powers.⁴

The incongruity of six governors appointing some seventy judges in a state that ostensibly demands that its judiciary be chosen by the electorate becomes ironic when it is considered that Mississippi was the first state in the Union to prescribe an elected, rather than an appointed, judiciary. The purpose of this comment is to trace the development of the methods of judicial selection from their English origins through their American variations, giving special emphasis to Mississippi methods and emerging merit-selection schemes.

II

*Here or anywhere, it will probably be admitted that . . . the English judges of today are about the best currently produced by the Anglo-Saxon race or, for that matter, any race.*⁵

In his praise of the excellence of the modern English judiciary, Justice Garwood might have appropriately added the caveat "Good things take time," for England's systems of selecting the men who administer justice are the result of over 900 years of trial and error.

The British experience began with the political tenet that judicial powers were a characteristic of the sovereign. As the responsibilities of ruling became increasingly time consuming, more and more sovereign functions were entrusted to the royal clerks. As government grew the functions of the clerks became more particularized. The earliest features of bureaucracy emerged as the courts evolved into separate entities, but they remained the king's courts, and judges remained royal appointees dependent upon the sovereign for their official commissions. "The

³"The governor shall have power to fill any vacancy which may happen during the recess of the senate in the office of judge or chancellor, by making a temporary appointment of an incumbent, which shall expire at the end of the next session of the senate, unless a successor shall be sooner appointed and confirmed by the senate. When a temporary appointment of a judge or chancellor has been made during the recess of the senate, the governor shall have no power to remove the person or appointee, nor power to withhold his name from the senate for their action."

⁴The Times-Picayune (New Orleans, Louisiana), Sep. 8, 1971, at 1, col. 3; The Commercial Appeal (Memphis, Tennessee), Sep. 8, 1971, at 1, col. 3; The Clarion-Ledger (Jackson, Mississippi), Sep. 8, 1971, at 8, col. 2.

⁵Garwood, *Breakfast Observations on Selection of Judges*, 44 J. AM. JUD. Soc'y 134, 138 (1960).

judges were appointed by the king, were removable at his will, their office terminated at his death, and the principle part of the emoluments of the offices were paid by him.”⁶

Through the twelfth and into the thirteenth centuries the judges continued to be chosen from among the royal clerks, and gradually the rudiments of a legal profession emerged. By the end of the thirteenth and the beginning of the fourteenth centuries, the clerks were being replaced by men who had made their career at the bar. By 1316 the order of Serjeants at Law was formed from among the ranks of the leading practitioners of law. As the king ceased selecting judges from the royal clerks, he began selecting them from among the serjeants, and in the sixteenth century there emerged the custom that only a serjeant could be made a judge.⁷

Chancellors, like judges, traced their origins to ecclesiastical clerks, but, uniquely among the courts, chancery remained an executive office. It was not until late in the sixteenth century that the appointment of lawyers to chancellorships became common.⁸

Until the seventeenth century judges remained outside the religious and political issues embroiling England, but

[A]s constitutional questions increased and were brought before the courts as legal issues, the judges gradually became involved in the political strife of the . . . century. The judges, lawyers and courts were caught up in the vortex of the conflict between King and Parliament. Most of the judges . . . became identified with the royal theories and power, and as adherents of the king some of them were subsequently punished when Parliament triumphed.⁹

The manipulations of the bench by the Stuarts, specifically their control over appointments and removals, led to the clause in the Act of Settlement of 1701¹⁰ that judges' commissions were to be made *quamdiu se bene gesserint* [during good behavior]. Thereafter, an act

⁶Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection*, 36 B. U. L. REV. 1, 15 (1956) [hereinafter cited as Vanderbilt].

⁷1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 194-95, 197 (7th ed. revised, reprinted 1966). After the middle of the sixteenth century it was customary that, prior to elevating any lawyer to the bench, an appointment to the ranks of the Serjeants at Law was required. This practice became so deeply rooted in English tradition that Parliamentary action was required for its abolition: The Judicature Act of 1873, 36, 37 Vict., c. 66, § 8; 1 HOLDSWORTH, *supra* at 197.

⁸Vanderbilt, *supra* note 6, at 16.

⁹*Id.*, at 16-17.

¹⁰12 & 13 Will. 3, c. 2, § 3 (7) (1701).

of Anne¹¹ permitted judges and other crown officials to retain their offices for six months after the death of the king or queen, and an act of George III¹² provided that the death of the crown would not affect judicial tenure.¹³ Significantly, George III

looked upon the independence and uprightness of the judges as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honor of the crown.¹⁴

Later scholars looked upon the establishment of judicial tenure during good behavior and the concomitant independence of the judiciary as

[t]he keystone of the rule of law in England. . . . It is the only respect in which we make any real separation of powers. There is no rigid separation between the legislative and the executive powers. . . . But the judicial power is truly separate. The judges for the last 250 years have been absolutely independent. . . . No member of Parliament, and no official of any Government Department, has any right whatever to direct or to influence or to interfere with the decisions of any of the judges.¹⁵

English judges are today appointed exclusively from the ranks of barristers of at least ten years experience, although it has been stated by a former Chief Justice of England, Lord Goddard, that “. . . nowadays 20 to 25 years standing is much more likely.”¹⁶ The highest ranking judicial officer in England is the Lord Chancellor, who is at once a Minister of the Crown responsible to Parliament, the head of the judiciary, and Speaker of the House of Lords. Although the Lord Chancellor is appointed by the Crown, custom dictates that the monarch merely confirm the recommendation of the Prime Minister. Notwithstanding the Act of Settlement of 1701,¹⁷ the Lord Chancellor is a political officer and changes with governments,¹⁸ but

it is traditional that the Prime Minister will not select a man to hold the office of Lord Chancellor . . . unless he is a man who enjoys the confidence of the judges and of the legal pro-

¹¹⁶ Anne, c. 7, § 8 (1706).

¹²¹ Geo. 3, c. 23 (1760).

¹³¹ HOLDSWORTH, *supra* note 7, at 195.

¹⁴Preamble, 1 Geo. 3, c. 23 (1760); Vanderbilt, *supra* note 6, at 18.

¹⁵Vanderbilt, *supra* note 6, at 18.

¹⁶Goddard, *Politics and the British Bench*, 43 J. AM. JUD. SOC'Y 124, 125 (1959).

¹⁷12 & 13 Will. 3, c. 2, § 3 (7) (1701).

¹⁸Coldstream, *Judicial Appointments in England*, 43 J. AM. JUD. SOC'Y 41 (1959); Stason, *Judicial Selection Around the World*, 41 J. AM. JUD. SOC'Y 134, 136 (1958); Goddard, *supra* note 16, at 125-29.

fession as a whole, . . . particularly the confidence of the judges and of the bar. . . . [A]ll Lord Chancellors . . . are . . . men who are thoroughly known and respected by the legal profession long before they reach the Woolsack.

It is this personal quality in the Lord Chancellor . . . that enables him to perform the difficult and anxious task of selecting the members of the judiciary. In the process of selection he acts, and is trusted to act, judicially, that is without fear or favour, affection or ill-will. . . .

Nor will the Lord Chancellor lose the common touch in his elevation to the Woolsack. He will remain a bencher of his Inn, with no greater right than any other bencher and remaining in his place in the hierarchy of the bench. Thus he remains subject to the pressures of the professional and social criticisms of his intimates, with whom and against whom he has fought during his days at the bar.¹⁹

All other English judges are selected by the Lord Chancellor, but their tenure is during good behavior and, of course, they do not relinquish their offices with the changes of governments. The enormous patronage wielded by the Lord Chancellor has apparently suffered no abuse in modern times, but this is not to say that political considerations are not involved in the selection of judicial appointees. Chief Justice Goddard addressed this specific point as follows:

It is easy and tempting to say that politics have nothing to do with it, but if by that is meant that no politician should be made a judge, or that a seat on the bench should never be a reward for political service, a little reflection will show that the problem is by no means as simple as that. It is highly desirable there should be lawyers in Parliament, and the law officers, the attorney-General always, and the Solicitor-General almost always, are members of the House of Commons where they have to take part in piloting intricate bills and to answer criticism on matters connected with the law and its administration. Prominent members of the bar have always gone into Parliament with the legitimate ambition of becoming law officers or obtaining puisne judgeships. If they are competent lawyers and show that they have judicial temperament, it would surely be quite as wrong to rule them out merely because they are in Parliament and support the government as it would be to appoint them merely because, while they were in Parliament, they could be relied on to vote with their party.²⁰

The high esteem with which the English regard their judiciary and their judiciary's long record of integrity and competency can probably

¹⁹Coldstream, *supra* note 18, at 42.

²⁰Goddard, *supra* note 16, at 129-30.

be attributed directly to Britain's success at preventing the development of the invidious politics so prevalent in America. The leadership of the English bar sits on the bench; the ultimate reward for an outstanding career at the bar is a judicial appointment. "And the public knows the process of judicial selection to be such that only by way of accident can a mediocre or otherwise undesirable judge obtain the office. . . . *It is not a process of popular election for a limited term, but rather a scrupulously studied selection by experts and for a term of service limited only by continued good behavior.*"²¹ (emphasis added)

III

The History of the present King of Great-Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid World.

. . . .

He has obstructed the Administration of Justice, by refusing his Assent to Laws establishing Judiciary Powers.

*He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the amount and Payment of their Salaries.*²²

Although the Act of Settlement of 1701²³ guaranteed the British judiciary tenure during good behavior, the Act was held not applicable to England's colonial possessions. In the famous trial of Peter Zenger in New York, one of the principal thrusts of the defense was directed at the legality of the judges' commissions on the grounds that they were during pleasure and not during good behavior.²⁴ In 1761 New York judges refused to serve unless their commissions were for good behavior rather than during the Crown's pleasure. The New York colonial legislature passed an act providing tenure during good behavior,

²¹Garwood, *supra* note 5, at 138.

²²THE DECLARATION OF INDEPENDENCE; see E. DUMBAULD, THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY 158-59 (1950). The "present King of Great-Britain" who "obstructed the Administration of Justice" and "made Judges dependent on his Will" in the American colonies was the same George III who, in his domestic policies, "looked upon the independence and uprightness of the judges as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honor of the crown."—Stark evidence that "credibility gaps" are nothing uniquely characteristic of twentieth century leaders only. See text, *supra*, at 4.

²³12 & 13 Will. 3, c. 2, § 7 (1701).

²⁴J. ALEXANDER, THE TRIAL OF JOHN PETER ZENGER, 397 (1 Annals of America, 1968).

prompting George III to threaten with removal from office any colonial governor who assented to any act regulating tenure; all commissions were to be during the king's pleasure only.²⁵

From the outset the state constitutions provided for judiciaries appointed by either their chief executives or their legislatures and, with few exceptions, granted their judges tenure during good behavior.²⁶ The delegates to the federal constitutional convention in 1789 agreed early that the federal judiciary would also serve during good behavior,²⁷ but the question of judicial selection generated long debates. The Vir-

²⁵"The British government claimed that the rule appropriate in England was not suitable to the situation of the Colonies. In the mother country the independence of the judges was assured not only by their tenure but by fixed salaries, which were not provided in the Colonies. Moreover, unless judges were removable at the king's pleasure, an unfit person, who might have obtained office because of the scarcity of properly qualified lawyers in the Colonies, could not be displaced even though a more fit person might afterwards be found." E. DUMBAULD, *supra* note 22, at 113.

²⁶By 1800 the states of Connecticut, Delaware, Georgia, Kentucky, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, and Virginia provided for the selection of judges by either executive or legislative appointment. With only three exceptions these states provided judicial tenure during good behavior: Georgia, New Jersey, and Vermont provided tenure during a term of years. E. HAYNES, *SELECTION AND TENURE OF JUDGES* 101-35 (1944).

²⁷See Vanderbilt, *supra* note 6, at 35. Alexander Hamilton deemed judicial tenure during good behavior crucial to the success of the United States.

The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

. . . .

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws. THE FEDERALIST No. 78, at 483, 89 (H. Lodge ed. 1888) (A. Hamilton).

ginia Plan proposed a federal judiciary chosen by the federal legislature,²⁸ while the New Jersey Plan envisioned a federal judiciary appointed by the president.²⁹ A compromise of the plans resulted in Article II Section 2 of the Constitution of the United States of America:

[The President] . . . shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . the judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for.

. . .³⁰

IV

The authority . . . given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution. . . .

. . . .

[A] legislative act contrary to the constitution is not law. . . .

—Chief Justice John Marshall,
*Marbury v. Madison*³¹

The limits of Thomas Jefferson's and many another American's tolerance for the seemingly unbridled independence of the federal judiciary were reached when, in *Marbury v. Madison*, the Supreme Court announced its power to declare void, legislation passed by Congress and accepted by the President. "It is a misnomer to call a government republican in which a branch of the supreme power is independent of the nation,"³² Jefferson wrote after the landmark decision. For the next twenty years Jefferson attempted first to establish a system of impeaching politically undesirable judges and second a constitutional amendment limiting them to six-year terms of office, and finally he toyed with the idea of popular election of judges.³³ In 1820 he wrote:

The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the

²⁸M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* app. 2 (The Virginia Plan) at 225, 227 (1939).

²⁹*Id.*, app. 3 (The New Jersey Plan) at 231.

³⁰"To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudices, from family connection, from personal attachment, or from a view to popularity." *THE FEDERALIST* No. 76, at 474 (H. Lodge ed. 1888) (A Hamilton).

³¹5 U.S. (1 Cranch) 137, 176-77 (1803).

³²E. HAYNES, *supra* note 26, at 93.

³³*Id.* at 93, 94.

foundations of our confederated fabric. . . . This will lay all things at their feet. . . . Having found from experience, that impeachment is an impractical thing, a mere scarecrow, they consider themselves secure for life. . . . An opinion is huddled up in conclave, perhaps by a majority of one, [and] delivered as if unanimous . . . by a crafty chief judge.³⁴

Thomas Jefferson's attacks on the judiciary were only one of many factors that led to the erosion of judicial independence and respect in America during the early nineteenth century. The wave of democratic fervor sweeping Europe and America, the expansion into and development of the Mississippi and Ohio valleys and the resultant creation of frontier states, the influx of immigrants fresh from lands under the authority of an imperious aristocracy, the extension of the franchise to non-property owners, the abolition of property qualifications for holding public office, the suspicion with which Americans came to regard the English common law, the view that judges and lawyers were representatives of an oppressive creditor class, the growing class-consciousness of industrial laborers, and the pioneer idea that any man should be able to perform any task or fill any office without special training all contributed to the rising public belief that judicial independence and lack of responsibility to the people were both dangerous and undemocratic.³⁵

Constitutional conventions were called, and radical changes in American judicial selection and tenure resulted. In keeping with the then-current political thought, many states vested in their legislatures the power to elect judges; other states granted the power of judicial selection to their chief executives, but they were themselves named by the legislatures in many states. Tenure during good behavior virtually disappeared from the state judicial bodies; the new constitutions provided tenure for a term of years. Only the federal judiciary successfully resisted the winds of democratic change.³⁶

³⁴*Id.* at 94, 95.

³⁵*Id.* at 80-101.

³⁶*Id.* During the proceedings and debates of the Virginia constitutional convention of 1829-30, Chief Justice Marshall vigorously opposed that state's attempts to abolish judicial tenure during good behavior:

The argument of the gentleman goes to prove not only that there is no such thing as Judicial Independence, but that there ought to be no such thing: that it is unwise and improvident to make the tenure of the Judge's office to continue during good behavior. . . . I have grown old in the opinion that there is nothing more dear to Virginia, or ought to be dearer to her statesmen, and that the best interests of our country are secured by it. Advert, Sir, to the duties of a Judge. He has to pass between the government and the man whom the court is prosecuting; between the most powerful individ-

V

*There has been much division of opinion among thinkers upon the subject of whether the judges should be appointed by the governor with the advice and consent of the senate, or whether they should be elected by the people, and also whether they should hold for life or during good behavior as under the federal constitution, or whether they should have fixed terms for less than life or good behavior. . . . It seems desirable to remove the judges as far from politics as possible consistent with the right of the people to select their agents for the administration of government. . . .*³⁷

The judicial provisions of Mississippi's first constitution, the Constitution of 1817, reflected both the general idea prevalent in eighteenth and early nineteenth century America that judges should serve during good behavior and the dissatisfaction which developed during the territorial period with old and incompetent judges. Article 5, Section 9 of the 1817 Constitution provided:

The judges of the several courts of this state shall hold their offices during good behavior. And for wilful neglect of duty, or other reasonable cause, which shall not be sufficient ground for an impeachment, the governor shall remove any of them on the address of two-thirds of each house of the general assembly.

The 1817 instrument further provided that no person beyond the age of sixty-five years could be appointed or allowed to retain a judicial position.³⁸ There is evidence that many delegates to the constitutional convention preferred judicial appointments for a term of years, but a

ual in the community, and the poorest and most unpopular. . . . The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important, that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience. You do not allow a man to perform the duties of a juryman or a Judge, if he has one dollar of interest in the matter to be decided; and will you allow a Judge to give a decision when his office may depend upon it? When his decision may offend a powerful and influential man? . . . I acknowledge that, in my judgment, the whole good which may grow out of this Convention . . . will never compensate for the evil of changing the tenure of Judicial office. Vanderbilt, *supra* note 6, at 24, n. 85.

"I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary." *Id.* at 24.

³⁷G. ETHRIDGE, MISSISSIPPI CONSTITUTIONS 275 (1928).

³⁸MISS. CONST. art. 5, § 10 (1817).

motion to change Article 5, Section 9 to read "for _____ years" rather than "during good behavior" failed by a very close vote. There was also close voting on an unsuccessful motion to make the judges removable by a simple, rather than a two-thirds, majority of the general assembly.³⁹ Judicial appointments were to be made by a joint vote of both houses of the legislature,⁴⁰ but vacancies arising during a legislative recess were to be filled by executive commissions expiring at the end of the next legislative session.⁴¹

The desires of the Constitutional Convention of 1832 to draft a document more democratic than the Constitution of 1817 brought an end to judicial tenure during good behavior in Mississippi and ushered in the first popularly elected judiciary in America.⁴² Unpopular judicial decisions, personal misbehavior, and official misconduct in the judicial ranks sparked unsuccessful efforts to remove justices of the peace and probate judges from office,⁴³ but perhaps the most important fomentors of dissatisfaction with the Mississippi judiciary, notwithstanding the impact of "Jacksonian democracy,"⁴⁴ were the unsuccessful efforts of

³⁹W. Drake, *Constitutional Development in Mississippi, 1817-1865*, 55, 84-85, 1954 (unpublished thesis in the University of North Carolina library).

⁴⁰Miss. CONST. art. 4, § 17 (1817): "There is no evidence that the election of judges by the people was suggested in the convention. While the convention was in session a writer in one of the Natchez newspapers offered some advice to the convention on the judiciary article. He advocated the appointment of judges by the governor with the approval of the legislature. He also presented arguments against the periodical election of judges by the people, and said that popular election was being advocated by some citizens as being democratic and as a means of making the judges answerable for 'malfeasance or irregularities.'" Drake, *supra* note 39, at 83, n. 62.

⁴¹Miss. CONST. art. 4, § 13 (1817).

⁴²See HAYNES, *supra* note 26, at 99-100; Hyde, *Judges: Their Selection and Tenure*, 30 J. AM. JUD. SOC'Y 152, 153 (1947).

⁴³Drake, *supra* note 39, at 108-10.

⁴⁴See Part IV, *supra*. Professor W. Magruder Drake observed of the rise of Jacksonian democracy and its purported influence on the development of Mississippi governmental institutions:

It is easy to point to the constitution of 1832 and say that it was the result or manifestation in Mississippi of a nation-wide or even a world-wide movement known in later times as "Jacksonian democracy." But it is not easy to find much direct evidence of the fact that, between 1817 and 1830, the people of Mississippi were actually demanding or clamoring for changes in the conservative features of the constitution of 1817. If the constitution of 1832 is considered a result of the forces of Jacksonian democracy, therefore, it should be noted that the end result of any such popular movement is evidence that it did exist. Also, it is seldom possible to know exactly what the mass of the people of an earlier era were thinking or saying, and one can only assume that their representatives in the state legislature, in their actions and votes, reflected the will of the people. Drake, *supra* note 39, at 102.

three consecutive legislatures to impeach supreme court justice Joshua Child on grounds of dueling, drunkenness, and official misconduct and the controversial supreme court decision in *Cochrane v. Kitchens*⁴⁵ declaring unconstitutional an act of the Mississippi General Assembly. The supreme court judges were ordered before a committee of the state legislature to show cause why they should not be removed from office for their decision in the *Cochrane* case. Although the judges were eventually exonerated, the committee responsible for the investigation found no constitutional power authorizing judges to declare laws unconstitutional. "The 'outrageous official conduct' of Judge Child in particular, and the 'ascertained impossibility of getting rid of a judge misconducting himself ever so grossly, by *impeachment*,' were said to have 'contributed very materially' to the change in the constitution to provide for popular election of judges for a term, rather than appointment during good behavior."⁴⁶

The Constitutional Convention of 1832, well aware of the shortcomings of the state's judicial machinery, devoted more time to and achieved more changes in the judicial article of the 1832 Constitution than in any other part of that instrument. Whereas the 1817 Constitution provided for the popular election of only the governor, lieutenant governor, sheriffs, coroners, and legislators, with the legislature appointing all other officers, the 1832 Constitution's radical features provided "that not only the state and county executive officers, but also all judicial officers, from justices of the peace to judges of the high court of errors and appeals, should be elected by the people. The only public official in the state not elected by the people was the clerk of the high court."⁴⁷ Although there was opposition to the application of the elective process to the judiciary, after the first few years under the 1832 instrument there were no serious efforts to revive the appointive system.⁴⁸ Gone also was the standard of judicial tenure during good behavior. The 1832 Constitution provided:

⁴⁵*Cochrane v. Kitchens* (Supreme Court of Mississippi, June Term 1824). Unfortunately, *Cochrane v. Kitchens* is one of many opinions delivered orally from the bench and not reported because the first official reporter, R. J. Walker, of Natchez, was not in attendance. See Griffith, *Mississippi Reports and Reporters*, 22 Miss. L.J. 37-39 (1950). For a contemporary newspaper account of the case and subsequent investigation, see *The Woodville Republican* (Woodville, Mississippi), January 25, 1825, at 3, col. 2.

⁴⁶Drake, *supra* note 39, at 108-10.

⁴⁷*Id.*, at 321; see Miss. CONST. art. 4, §§ 2, 5, 11, 16, 18, 20, 23 (1832).

⁴⁸Drake, *supra* note 39, at 321. A letter to the editor of the Natchez Courier, March 22, 1833, signed "Fiat Justitia," predicted that the system of electing the judiciary would result in "intrigue, corruption, and partiality," and that "[p]ublic virtue

No person shall ever be appointed or elected to any office in this state for life or during good behavior, but the tenure of all offices shall be for some limited period of time, if the person appointed or elected thereto shall so long behave well.⁴⁹

Although the Constitution of 1869 retained the proscription of tenure during good behavior,⁵⁰ the post-Civil War instrument reverted to the system of appointing judicial officers. Unlike the 1817 Constitution, the 1869 document made specific provisions for executive appointment, by and with the advice and consent of the senate, of all judges of courts of record.⁵¹ However, it is not to be presumed that the 1869 Constitution reflected wide-spread dissatisfaction with the provisions of the 1832 Constitution. Rather, one may safely presume that the majority of Mississippians—more particularly, the majority of disfranchised white Mississippians—were by far more content with the 1832 instrument than the 1869 “Mongrel” constitution. Indeed, an item appearing in a Jackson newspaper as a proposed “preamble” to the new constitution expressed the sentiments of many Mississippians:

To the end that injustice be established, anarchy organized, tyranny inaugurated, and all manner of wickedness practiced under the forms of law, this covenant of death and league with hell is hereby ordained.⁵²

Dissatisfaction with the appointive system established by the 1869 Constitution continued so long as the system existed. Twenty-two years passed until the Constitution of 1890 was adopted, thereby restoring a judiciary elected for a term of years.⁵³ The 1890 Constitution embodied

will wither and droop and die. Vice will be triumphant.” See Drake, *supra* note 39, at 175, n. 102.

⁴⁹MISS. CONST. art. 1, § 30 (1832).

⁵⁰MISS. CONST. art. 1, § 29 (1869).

⁵¹*Id.*, art. 6, §§ 2, 3, 11, 17.

⁵²Daily Clarion (Jackson, Mississippi), June 6, 1868, at 2, col. 2.

⁵³A Jackson editor offered this bit of advice to the delegates to the Constitutional Convention:

The question of the mode of selecting judges is of grave concern and Democrats differ widely in opinion upon the subject. Mississippi pioneered the system of electing judges by the people. The plan of election was at one time universally approved by the people of our State. The difference of opinion now existing is due to changed conditions too well understood to require explanation. They can be readily reconciled by authorizing the Legislature to provide for popular elections in districts where people desire, and for appointment in districts where the present mode may be preferred. The same rule can be observed if deemed expedient, in the selection of the Judges of the Supreme Court. Daily Clarion-Ledger (Jackson, Mississippi), March 18, 1890, at 1, col. 2.

the principle that no public servant could serve during good behavior or for life but only for a specified term of years⁵⁴ and applied that principle to all judicial officers in the state.⁵⁵

VI

*For the election of judges by popular vote there is nothing to be said. Insofar as its underlying assumption is the belief that the people should choose those by whom they are to be governed it omits to note the vital fact that the qualifications for judicial office are not such as an undifferentiated public can properly assess. . . . Knowledge of the law, the balanced mind, the ability to brush aside unessentials and drive to the heart of a case—that a candidate will possess these qualities can, at best, be known only to a few. The people do not, in fact, choose their judges, they decide between the candidates of opposing parties. . . .*⁵⁶

Efforts to improve state judicial bodies by freeing judges from partisan politics demonstrated little ingenuity and less accomplishment until the American Bar Association in 1937 adopted a resolution to establish methods of judicial selection “‘that will be conducive to the maintenance of a thoroughly qualified and independent judiciary and that will take the judges out of politics as nearly as may be.’”⁵⁷ The resolution set forth two procedures for accomplishing its stated goal:

First—Appointment by the executive “but from a list named by another agency composed in part of high judicial officers and part of other citizens, selected for the purpose, who hold no other public office.”

Second—After a period of service, the appointee should “go before the people upon his record, with no opposing candidate, the people voting upon the question ‘Shall Judge Blank be retained in office.’”⁵⁸

In 1940 Missouri voters amended their constitution to provide for a judicial selection system based on the 1937 resolution of the American Bar Association and thereby became the first state to establish a merit

⁵⁴“No person shall be elected or appointed to office in this state for life or during good behavior, but the term of all officers shall be for some specified period.” MISS. CONST. § 20 (1890).

⁵⁵MISS. CONST. §§ 145, 145A, 145B, 149 (Supreme Court), 153 (circuit and chancery courts), 170 (supervisors), 171 (justices of the peace); MISS. CODE ANN. § 1608 (Supp. 1971) (county courts).

⁵⁶Laski, *The Technique of Judicial Appointment*, 24 MICH. L. REV. 529, 531 (1926).

⁵⁷Hyde, *Judges: Their Selection and Tenure*, 30 J. AM. JUD. SOC'Y 152, 155 (1947).

⁵⁸*Id.*

selection plan for judges.⁵⁹ The "Missouri Plan" established two levels of selection commissions. The commission for the appellate courts, including the state supreme court and three intermediate appellate courts, is composed of seven members: the chief justice of the supreme court serves as chairman; three laymen are appointed by the governor; three lawyers are selected at large by the state bar. Except for the chief justice, members serve six-year terms staggered so that one term expires at the end of each calendar year. Members may not succeed themselves and, while serving on the commission, may hold no other public office or political position. Lay members are appointed every two years by the governor, each from a different court of appeals district; likewise, the lawyer-members are elected every two years by the members of the bar of their respective appellate districts.

The selection commissions for city courts are composed of five members: the presiding judge of the appellate court of the district in which the city is located serves as chairman of the commission of two laymen, appointed by the governor, and two lawyers, elected by the local bar. As with the appellate commission, members' terms, except the presiding judges', are for six years, staggered so that each member's term expires in a different year. Since the governor of Missouri serves a four-year term and may not succeed himself, no governor can appoint all the members of the commissions.⁶⁰

Whenever a vacancy occurs in any judicial office affected by the plan, three steps are taken to name a successor:

1. The proper nominating commission selects three persons who, so far as may be determined, possess the requirements of a judge, and their names are submitted to the governor.

2. The governor appoints one of the three nominees to fill the vacancy. In the event the governor fails to appoint within a specified

⁵⁹MO. CONST. art. 5, § 29 (a) *et seq.* Although the plan was met with some amount of skepticism when first proposed,

To the surprise of everyone, the amendment was adopted at the 1940 election by more than 90,000 votes. Its opponents said that the people did not understand it and obtained its resubmission by the 1941 Legislature. It was then retained by more than 180,000 votes. This was considered a rather effective demonstration that the people likewise understood what some of the opponents of the plan wanted. Therefore, when a convention was assembled in 1943 to frame a new constitution for Missouri, this plan was re-incorporated in it without change except to place more judges under it. Hyde, *supra* note 58, at 156.

⁶⁰Hyde, *supra* note 58, at 156.

time, the nominating commission is empowered to appoint from the three names originally submitted to the governor.

3. If after twelve months service as judge the appointee indicates to the secretary of state that he desires to serve a full term (twelve years, appellate judges; six years, trial judges), his name is placed on a special judicial ballot with no party or political designation, as follows:

SHALL JUDGE _____,
(Here the name of the Judge shall be inserted)

OF THE _____ COURT
(Here the title of the court shall be inserted)

BE RETAINED IN OFFICE?

YES ☐

NO ☐

(check one)

The names of judges desiring to serve full terms are submitted to the electorate at the next general election. Supreme and intermediate appellate court judges are elected by the voters of the three Missouri appellate court districts; trial court judges are elected by the voters of their respective judicial circuits. Judges who receive a favorable vote serve full terms; if the vote is against retention of a judge, or if a judge fails to declare his intention to go before the electorate, a vacancy exists and the appointing process begins anew.⁶¹

That the Missouri Plan has improved the caliber of the state judiciary by deleting political considerations from judicial selections, thereby attracting men to the bench who would otherwise remain at the bar, was revealed by a review of the achievements of the plan after its first twenty-five years of operation:

As a whole, the lawyers appointed to the bench under the Plan have not been politicians, although many of them have taken part in city, county and state affairs; however, all of them have observed the constitutional mandate [prohibiting judges from engaging in politics] and have completely removed themselves from politics. Our judges now are free to devote their entire attention to court business. They have no political fences to mend, and are free to decide the issues in all cases under the applicable law and evidence without fear or favor, and independent of outside influence. The political bosses or other

⁶¹Bundschu, *The Missouri Non-Partisan Court Plan—Selection and Tenure of Judges*, 16 U. Mo. K. C. L. REV. 55 (1948). A selected annotated bibliography of materials dealing with judicial administration, including the Missouri Plan and other non-partisan, merit selection systems, appears at 45 J. AM. JUD. Soc'y 177-88 (1962).

interests no longer attempt to control or influence the courts. We have been able to attract able, well qualified men to the bench, who would not have considered a judicial career under the old system. The Plan has been successful in eliminating personal and political appointments to the bench and partisan elections. *The over-all result has been abler and better qualified judges, whose sole duties are to administer equal justice to all without delay. Because of this the Missouri Plan has been a tremendous improvement in comparison with the old partisan political system.*⁶² (Emphasis added.)

VII

*The vital question is of course whether the masses, energized and activated by freedom, can create aught worthwhile on their own.*⁶³

Perhaps there has been no greater achievement of western man than the evolution of the common law, those principles by and upon which he has sought to govern the daily affairs of life. Over a half-millennium of trial and error led British rulers to realize that political stability was greatly dependent upon the faith of the governed that their conduct would be measured in their courts by impartial, independent judges applying historically-forged standards, rather than by judicial tyrants rendering only fiat. The men to whom Britons entrusted the power and responsibility of selecting judicial officers were tradition-bound, aristocratic intelligentsia who selected, for the most part, tradition-bound, aristocratic intelligentsia to serve as judges. These judges established legal principles that are at once the most durable and the most flexible in the annals of history.

While American legal institutions are founded upon the same broad principles as their English counterparts, America has never achieved a system of filling judicial posts with the best qualified men. Unlike Great Britain, where judges are selected by an elite corps of jurists, whose choices are based on the sound advice of their contemporaries and their own discriminating observations, America has experienced a history of trusting the responsibility of selecting judges to chief executives or legislatures. After it became apparent that neither of these political organs was competent to make consistently sound selections, the responsibility has been shifted to the electorate. The historical trend is evident in Mississippi's groping for a suitable system. Political leaders have been unsuccessful at appointing good judges consistently, and the electorate

⁶²Hall, *The Missouri Nonpartisan Court Plan: A Quarter Century Review*, 33 U. Mo. K. C. L. REV. 163, 168 (1965).

⁶³E. HOFFER, *THE ORDEAL OF CHANGE* 39 (1964).

has been unsuccessful at electing them. The next step should be in the direction of a system that makes judicial selections based upon the studied recommendations of panels of citizenry and bar members chosen for that specific task.

Arlen B. Coyle

STATUTORY AUTHORIZATION OF ADDITUR AND REMITTITUR

I. INTRODUCTION

The power of a court, on motion for a new trial due to inadequate damages rendered by jury verdict, to require the defendant to consent to an increase to a stipulated amount of the award as a condition for denial of the motion for a new trial is commonly referred to as additur.¹ This practice has also been described as *increscitur*.² Similar to additur is remittitur, a term which describes the power of a court upon a motion for a new trial due to excessive damages rendered by a jury to require the plaintiff to consent to a decrease in the award to a specified amount as a condition for denial of the motion.³ Additur and remittitur are designed to bring inadequate or excessive damages awarded by a jury within the "amount of damages which the court judicially knows is within the limits of a proper verdict"⁴ and thereby avoid the necessity of a new trial.⁵

This comment will examine the history of additur and remittitur in Mississippi and analyze the recently enacted statutory authorization⁶ for the use of additur and remittitur in this state. This necessitates a general survey of the historical development and status of additur and remittitur in other jurisdictions.

II. DEVELOPMENT AND STATUS OF REMITTITUR

A. *Development and Status in Other Jurisdictions*

The practice of remittitur has long been established in American jurisprudence.⁷ It was utilized in the federal courts by Mr. Justice Story,

¹Bender, *Additur—The Power of the Trial Court to Deny a New Trial on the Condition That Damages Be Increased*, 3 CALIF. W. L. REV. 1 (1967) [hereinafter cited as Bender].

²McCormick, DAMAGES § 19 at 82 (1935); Note, *Increscitur in Personal Injury Cases*, 15 ST. LOUIS L. REV. 169 (1930).

³Carlin, *Remittiturs and Additurs*, 49 W. VA. L. REV. 1 (1942).

⁴Dimick v. Schiedt, 293 U.S. 474, 497 (1935) (dissenting opinion).

⁵Bender, *supra* note 1.

⁶MISS. CODE ANN. § 1686.5 (Supp. 1971).

⁷See the collection of decisions in Annot., 53 A.L.R. 779, 783-92 (1928), 95 A.L.R. 1163, 1166-68 (1935); In England the practice of remittitur was at first approved in

sitting on circuit, as early as 1822 in *Blunt v. Little*,⁸ and its use has been held to give the defendant no cause for objection.⁹ The scope of the use of remittitur in federal courts was set forth in *Hansen v. Boyd*¹⁰ where it was stated:

The rule has been adopted by this court that it is proper, either for the trial court upon an application for a new trial, or for an appellate court in reviewing a judgment, to permit the party, in whose favor a verdict or judgment has been returned or entered, to avoid the granting of a new trial on account of error affecting only a part thereof, by entering a remittitur as to such erroneous part, when the court can clearly distinguish and separate the same.¹¹

In 1935 the United States Supreme Court in *Dimick v. Schiedt*,¹² while holding additur unconstitutional, indicated that the practice of remittitur "would not be reconsidered or disturbed."¹³

B. Development in Mississippi

As in other jurisdictions, the practice of remittitur is firmly established in Mississippi,¹⁴ and a plaintiff who voluntarily consents to a remittitur has no standing on appeal.¹⁵ A conditional remittitur order may be entered in Mississippi when it is determined that a verdict of a jury is so excessive as to evince bias, passion, and prejudice on the part of the jury.¹⁶ In addition, it has been said that even when prejudice, passion, and bias are absent, a remittitur may be entered if the excessiveness of the judgment is unsupported by the evidence.¹⁷

It appears that the only attempt to limit the scope of the practice of remittitur in Mississippi came early in this century. Section 4910 of

Belt v. Lawes, 12 Q.B.D. 356 (1884), but was later repudiated, and *Belt* was overruled in *Watt v. Watt*, A.C. 115, 6 B.R.C. 1 (1905).

⁸3 F. Cas. 760 (C.C.D. Mass. 1822).

⁹*Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69 (1889).

¹⁰161 U.S. 397 (1896).

¹¹*Id.* at 411.

¹²293 U.S. 474 (1935).

¹³*Id.* at 485.

¹⁴*Houston v. Page*, 208 So. 2d 901 (Miss. 1968); *Dennis v. Berryman*, 200 So. 2d 437 (Miss. 1967); *Dendy v. City of Pascagoula*, 193 So. 2d 559 (Miss. 1967); *Whitten v. Land*, 188 So. 2d 246 (Miss. 1966); *Capital Transport Co. v. Segrest*, 254 Miss. 168, 181 So. 2d 111 (1965); *Rayner v. Lindsey*, 243 Miss. 824, 138 So. 2d 902 (1962); *Thomas v. Fleming*, 241 Miss. 26, 128 So. 2d 854 (1961); *Motors Ins. Corp. v. Lenior*, 218 Miss. 348, 67 So. 2d 381 (1953); *Case v. Yazoo & M.V.R.R.*, 114 Miss. 21, 74 So. 773 (1917); *Hurd v. Germany*, 8 Miss. 675 (1843); *Young v. Englehard*, 2 Miss. 19 (1834).

¹⁵*Alabama & V. Ry. v. Davis*, 69 Miss. 444, 13 So. 693 (1891).

¹⁶*Whitten v. Land*, 188 So. 2d 246 (Miss. 1966).

¹⁷*Rayner v. Lindsey*, 243 Miss. 824, 138 So. 2d 902 (1962).

the Mississippi Code of 1906 purported to abolish all authority of a trial court to enter a remittitur order.¹⁸ In addition, it was provided that when the only error committed during the trial was the excessiveness of the verdict, the court was compelled to deny the defendant's motion for a new trial.¹⁹ Furthermore, the supreme court was given the authority to either reverse the case or enter a conditional remittitur order if and when the case was appealed.²⁰ The constitutionality of this statute was challenged in 1907 in *Yazoo & M.V.R.R. v. Wallace*²¹ wherein, after a \$50,000 verdict was returned in favor of the plaintiff, the trial court denied the defendant's motion for a new trial on the basis that §4910 gave it "no power to interfere with the amount of the verdict."²² Of §4910, the supreme court said:

This statute is plainly unconstitutional and void. It is for the benefit of plaintiffs. It shuts out defendants from having complete and final disposition of their rights in a forum provided by the organic law for all, and into which they have been forced by plaintiffs. It compels them to appeal, which otherwise they might not wish to do, and then concludes with a clause, as a salve by attempting, in the very face of the Constitution, to give the Supreme Court original, instead of mere appellate, jurisdiction. It works only against the defendant litigant. If the verdict against him be for too much, he must bear the injustice; but note, if it be for too little, the favored plaintiff is not concluded, but may move for new trial.²³

Thus, other than the ill-fated attempt of the legislature in 1906 to limit its practice, remittitur may be said to be a well-established, judicial practice in Mississippi.

¹⁸MISS. CODE OF 1906 § 4910:

The circuit court shall not in any case have the authority to cause the plaintiff to enter a remittitur on pain of suffering a new trial, but if there is no other error committed during the trial of any such cause except that the verdict is, in the opinion of the court, excessive, the court shall overrule the defendant's motion for a new trial. But the Supreme Court may, where it thinks the verdict of the jury excessive, reverse the case unless the appellee will enter a remittitur in such sum as the Supreme Court shall direct.

¹⁹*Id.*

²⁰*Id.*

²¹90 Miss. 609, 43 So. 469 (1907).

²²*Id.* at 614, 43 So. at 470.

²³*Id.* at 614-15, 43 So. at 470. Chief Justice Whitfield, specially concurring, was not so kind in his denunciation of the statute. He declared that "[o]n behalf of the code commissioners who prepared the Mississippi Code of 1906, I desire to say that section 4910 here involved, . . . [is] nonsense written therein by legislative blundering." *Id.* at 616, 43 So. at 471.

III. DEVELOPMENT AND STATUS OF ADDITUR

A. Other Jurisdictions

An early consideration of whether a court has the power to increase the judgment of a jury occurred in *McCoy v. Lemon*,²⁴ decided in 1856, in which such authority was denied. In *McCoy* a South Carolina court refused to recognize an old common law rule that a trial court may increase the damages awarded by a jury in mayhem actions *super visum vulneris*.²⁵ In the following years some state decisions allowed courts to increase a jury verdict when the amount that was to be the subject of the increase was ascertainable by mathematical calculation or by definite and fixed rules of law.²⁶ The practice of additur was extended to personal injury suits involving unliquidated damages in a New Jersey²⁷ decision of 1917 and a Washington decision of 1924.²⁸

In 1935 *Dimick v. Schiedt*²⁹ presented to the United States Supreme Court the question of whether to allow the practice of additur in actions involving unliquidated damages in the federal courts. In a five-to-four decision,³⁰ the Court held that an additur entered without the consent of the plaintiff acted to deprive him of his right to a trial by jury under the seventh amendment to the United States Constitution.³¹ To ascertain the scope and meaning of the seventh amendment, the Court turned to the common law rules as they existed at the time of the adoption of the seventh amendment in 1791 and concluded:

[W]hile there was some practice to the contrary in respect of *decreasing* damages, the established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to *increase* the

²⁴45 S.C.L. (11 Rich.) 165, 70 Am. Dec. 246 (1856).

²⁵Upon viewing the wound.

²⁶*James v. Morey*, 44 Ill. 352 (1867); *Carr v. Miner*, 42 Ill. 179 (1866); *Marsh v. Kendall*, 65 Kan. 48, 68 P. 1070 (1902); *McAfee v. Dix*, 101 App. Div. 69, 91 N.Y. Supp. 464 (1905); *Alloway v. City of Nashville*, 13 S.W. 123 (Tenn. 1890).

²⁷*Gaffney v. Illingsworth*, 90 N.J.L. 490, 101 A. 243 (1917).

²⁸*Clausing v. Kershaw*, 129 Wash. 67, 224 P. 573 (1924).

²⁹293 U.S. 474 (1935).

³⁰This decision has been the subject of severe criticism. See, e.g., Carlin, *supra* note 3, at 18; 10 WASH. & LEE L. REV. 46 (1953); Note, 23 CALIF. L. REV. 537 (1935); 14 So. CALIF. L. REV. 490 (1941).

³¹The seventh amendment to the United States Constitution provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court in the United States, than according to the rules of the common law.

amount of damages awarded by a jury in actions such as that here under consideration.³²

The Court pointed out that the question of damages is a question of fact, and since the power to determine questions of fact lies within the province of the jury, a federal court's action of increasing an award of damages constitutes a re-examination of a fact tried by a jury³³ and violates the seventh amendment.

Although the remittitur practice might have been held unconstitutional upon the same argument as was applied with respect to additur, the Court attempted to rationalize a distinction between the two practices, stating:

Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess,—in that sense that it has been found by the jury,—and that the remittitur has the effect of merely lopping off an excrescence. But where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict.³⁴

Justice Story, dissenting,³⁵ recognized that the practice of additur is a method whereby litigation may be brought to a rapid, economical conclusion while procuring "substantial justice."³⁶ Of the distinction between additur and remittitur enunciated by the majority, Justice Story said:

The fact that in one case the recovery is less than the amount of the verdict, and that in the other it is greater, would seem to be without significance. For in neither does the jury return a verdict for the amount actually recovered, and in both the

³²293 U.S. at 482.

³³293 U.S. at 486.

³⁴293 U.S. at 486. Of this distinction, Professor Millar in *Notabilia of American Civil Procedure 1887-1937*, 50 HARV. L. REV. 1017 (1937), said:

There is no convincing reason why the *additur* (for so it has conveniently been called) should not be governed by the same considerations as the *remittitur*. The fact that in the one case the jury has reached and gone beyond the amount finally incorporated in the judgment, while in the other the jury has not reached that amount, represents a difference purely superficial, for in the case of *remittitur* no less than in that of *additur*, it is the jury's estimate which is the subject of the interference by consent of the party whom this interference adversely affects. *Id.* at 1053.

³⁵Chief Justice Hughes, Justice Brandeis, and Justice Cardozo joined in the dissent.

³⁶293 U.S. at 490 (dissenting opinion).

amount of recovery was fixed, not by the verdict but by the consent of the party resisting the motion for a new trial.³⁷

In concluding that additur did not violate the seventh amendment, he noted that the basis upon which a plaintiff's motion for a new trial due to inadequate damages is denied is "that the defendant has bound himself to pay an increased amount of damages which the court judicially knows is within the limits of a proper verdict."³⁸

The holding in *Dimick* that the additur practice is unconstitutional applies only to federal courts, since the seventh amendment to the United States Constitution has not been incorporated into the due process clause of the fourteenth amendment.³⁹ Furthermore, most state constitutions, in providing for the right to trial by jury in civil cases, do not contain a re-examination clause such as that found in the Federal Constitution.⁴⁰ However, in 1952 the California Supreme Court accepted the reasoning of *Dimick* and held in *Dorsey v. Barba*⁴¹ that the additur practice, when applied in cases involving unliquidated or dis-

³⁷293 U.S. at 494 (dissenting opinion).

³⁸293 U.S. at 497 (dissenting opinion).

³⁹*Pearson v. Yewdall*, 95 U.S. 294 (1877); *Walker v. Sauvinet*, 92 U.S. 90 (1875). See also *Malloy v. Hogan*, 378 U.S. 1, 4 n. 2 (1964) (dictum). The Mississippi Supreme Court in *Canning v. State*, 226 So. 2d 747, 752 (1969), indicating the contrary stated:

There seems to be no question now that the United States Supreme Court has firmly "absorbed" the first eight Amendments of the Constitution of the United States into the "due process" clause of the Fourteenth Amendment, and has thus made them applicable to the states.

Reference was made to *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Benton v. Maryland*, 395 U.S. 784 (1969), for a list of cases sustaining this proposition. This blanket statement by the Mississippi Supreme Court is clearly erroneous. Neither *Duncan* nor *Benton* contain any authority for this proposition with regard to the seventh amendment. It is possible that the source of this statement was the view expressed by Justice Black in a concurring opinion in *Duncan* as to what he thought the effect of the due process clause to be. However, as yet, the United States Supreme Court has rendered no decision which would incorporate the seventh amendment right to trial by jury in civil suits into the fourteenth amendment's due process clause. In fact, the United States Supreme Court has consistently taken the position that the seventh amendment guaranty of a right to trial by jury in common-law suits is not applicable to the states. See Annotation and collection of cases in 18 L. Ed 2d 1388, 1410-12 (1967), supplemented in 23 L. Ed 2d 985 (1969).

⁴⁰Most state constitutions provide that "the right to trial by jury shall remain inviolate." See, e.g., CALIF. CONST. art. I, § 7; NEB. CONST. art. I, § 6; OHIO CONST. art. I, § 5; NEW JERSEY CONST. art. I, ¶ 9. Only the constitutions of West Virginia and Oregon contain re-examination clauses resembling that of the seventh amendment to the United States Constitution. W. VA. CONST. art. 3, § 13; ORE. CONST. art. I, § 17. Louisiana has no constitutional guarantee of a right to trial by jury in civil cases.

⁴¹38 Cal. 2d 350, 240 P.2d 604 (1952).

puted damages, violated the state constitution⁴² in that it acted to deny a plaintiff of his right to determination by a jury of a factual issue (amount of damages).⁴³ The *Dorsey* decision, however, was reconsidered and expressly overruled in 1967 by *Jehl v. Southern Pacific Co.*⁴⁴ Chief Justice Traynor, writing for a unanimous court, stated that "when considered in the light of the demands of fair and efficient administration of justice . . . [the court did] . . . not believe that defendants should be denied the advantages of additur when they are required to submit to remittitur."⁴⁵ Rejecting the distinction between remittitur and additur raised in *Dimick* and *Dorsey*, Chief Justice Traynor stated:

Remittitur happened to develop earlier than additur because courts undertook to grant new trials for excessive damages long before they took similar action on the ground of inadequacy. (citations omitted). The issue of additur was not presented until modern times, but it is a logical step in the growth of the law relating to unliquidated damages as remittitur was at an earlier date. Its acceptance, though still somewhat retarded, is growing. It should not be treated differently from other modern devices aimed at making the relationship between judge and jury as to damages as well as to other matters,⁴⁶ one that preserves the essentials of the right to jury trial without shackling modern procedure to outmoded precedents. Additur does not detract from the substance of the common law trial by jury. Like its fraternal twin remittitur . . . it promotes economy and efficiency in judicial proceedings.⁴⁷

Since the seventh amendment, including its reexamination clause, is not applicable to the states, it was concluded that neither it nor the California Constitution forbade the use of additur or remittitur in the state courts of California.⁴⁸

Prior to *Jehl* several states passed upon the question of whether to allow additur in cases involving unliquidated or disputed damages.

⁴²CALIF. CONST. art. I § 7: "The right of trial by jury shall be secured to all, and remain inviolate. . . ."

⁴³38 Cal. 2d at 358, 240 P.2d at 608.

⁴⁴59 Cal. Rptr. 276, 427 P.2d 988 (1967); noted at 8 SANTA CLARA LAW. 123 (1967).

⁴⁵*Id.* at 280-81, 427 P.2d at 992-93.

⁴⁶Noting that judgment notwithstanding the verdict is allowed in California in cases where it is proper to issue a directed verdict, while such procedure has been held to be inconsistent with the seventh amendment to the Federal Constitution. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913). This position has been undermined in federal courts by Fed. R. Civ. P. 50(b) and *Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935).

⁴⁷59 Cal. Rptr. at 282-83, 427 P.2d at 994-95.

⁴⁸59 Cal. Rptr. at 285, 427 P.2d at 997.

Courts in New York,⁴⁹ Minnesota,⁵⁰ New Jersey,⁵¹ North Carolina,⁵² Utah,⁵³ and Wisconsin⁵⁴ have reached the conclusion that a conditional additur order does not deprive the plaintiff of his right to trial by jury. A Florida court, relying upon *Dimick* and *Dorsey* reached the opposite conclusion,⁵⁵ as have several other courts.⁵⁶

In 1970 the Supreme Court of Missouri considered additur in *Stahlheber v. American Cyanamid Co.*,⁵⁷ wherein a plaintiff-husband appealed on the grounds of inadequate damages a \$6,000 award for loss of services, assistance, society and consortium of his wife. He asked that any inadequacy in the jury's verdict be cured by an additur based upon a mathematical formula suggested by two prior cases⁵⁸ involving a husband's loss of his wife's services.⁵⁹ Recognizing that the doctrine of additur had never been applied in Missouri, the plaintiff raised the argument that additur is a logical corollary of remittitur, which was a firmly established practice in the trial and appellate courts of that state.⁶⁰ The court pointed out that this argument had previously been rejected in the early remittitur case of *Burdick v. Missouri Pacific Ry. Co.*,⁶¹ in which it was said:

An argument pressed upon our consideration in this case is this: That, if this court has the right and power to reduce the damages when excessive, it has the right and power to increase them when inadequate. We do not see the force of this line of argument. In one case the court simply says the judgment may stand for a part of the amount found by the jury, while in the other case it would add something never within the terms of the verdict.⁶²

⁴⁹*O'Connor v. Papertsian*, 309 N.Y. 465, 131 N.E. 2d 883 (1956).

⁵⁰*Genzel v. Halvorson*, 248 Minn. 527, 80 N.W. 2d 854 (1957).

⁵¹*Fisch v. Manger*, 24 N.J. 66, 130 A.2d 815 (1957).

⁵²*Caudle v. Swanson*, 248 N.C. 249, 103 S.E. 2d 357 (1958).

⁵³*Bodon v. Suhrmann*, 8 Utah 2d 42, 327 P.2d 826 (1958).

⁵⁴*Cordes v. Hoffman*, 19 Wis. 2d 236, 120 N.W. 2d 137 (1963), changing the method of determining the amount of the additur first advanced in *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374 (1927), Cf. *Powers v. Allstate Ins. Co.*, 10 Wis. 2d 78, 102 N.W. 2d 393 (1960).

⁵⁵*Sarvis v. Folsom*, 114 So. 2d 490 (Fla. App. 1959).

⁵⁶See *Bender*, *supra* note 1 at 20-24; Annot., 56 A.L.R. 2d 213.

⁵⁷451 S.W.2d 48 (Mo. 1970).

⁵⁸*Massey v. Berlo Vending Co.*, 329 S.W.2d 772 (Mo. 1959); *Gooch v. Avsco, Inc.*, 340 S.W.2d 665 (Mo. 1960).

⁵⁹*Stahlheber v. American Cyanamid Co.*, 451 S.W.2d at 64, 65.

⁶⁰*Id.* at 65.

⁶¹27 S.W.2d 453 (Mo. 1894).

⁶²*Id.* at 458.

Although recognizing that additur is applied in some jurisdictions, the Missouri court concluded that "[w]hatever might be the arguments in favor of the additur doctrine, we reject it in this case."⁶³ The case was reversed and remanded for a new trial on the issue of damages only.⁶⁴

Additur was apparently rejected in *Stahlheber* because the inadequacy of the damages grew out of the failure of the jury to give any consideration to possible future damages for the plaintiff's loss of consortium of his wife.⁶⁵ The court was of the opinion that "[a]n attempt to measure the amount of such damage, either on the basis of the record alone or on the basis of a mathematical formula . . . would not provide a proper consideration of this necessarily factual issue."⁶⁶ It should be noted that the Missouri Supreme Court apparently did not totally reject additur, rather, it rejected the practice where the jury totally fails to consider an element of damages.⁶⁷

The Supreme Court of Utah⁶⁸ has found the power of a court to enter a conditional additur or remittitur order "implicit within the authority of [that] court to grant a new trial on the . . . ground of 'excessive or inadequate damages.'"⁶⁹ The New Jersey Supreme Court in *Fisch v. Manger*⁷⁰ found that additur and remittitur "violate [no] constitutional interdictions and . . . serve the laudable purpose of avoiding a further trial where substantial justice may be attained on the basis of the original trial."⁷¹ One writer has observed that the decisions holding the practice of additur constitutional are "the better reasoned opinions on the question."⁷²

Prior to the enactment of section 1686.5 of the Mississippi Code, three states, Washington,⁷³ Rhode Island,⁷⁴ and Massachusetts⁷⁵ had statutes directly authorizing the additur practice. Additur had been approved by case law prior to the enactment of the Washington statute.⁷⁶

⁶³451 S.W. at 65.

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*Bodon v. Suhrmann*, 8 Utah 2d 42, 327 P.2d 826 (1958).

⁶⁹*Id.* at 828.

⁷⁰24 N.J. 66, 130 A.2d 815 (1957).

⁷¹*Id.* at 823.

⁷²*Bender*, *supra* note 1, at 26.

⁷³WASH. REV. CODE ANN. § 4.76.030 (1962).

⁷⁴R.I. GEN. LAWS ANN. § 9-23-1 (1956).

⁷⁵MASS. GEN. LAWS ANN. ch. 231, § 127 (Supp. 1970), *amending* MASS. GEN. LAWS ANN. ch. 231, § 127 (1956).

⁷⁶*Clausing v. Kershaw*, 129 Wash. 67, 224 P. 573 (1924).

The Rhode Island statute is interesting in that it requires the court to give the defendant an opportunity to consent to an additur before a new trial due to inadequate damages may be granted.⁷⁷ The granting of an additur under this statute has been held not to be an invasion of the province of the jury.⁷⁸ The Massachusetts statute originally provided that "[a] verdict shall not be set aside solely on the ground that damages are inadequate until the parties have first been given an opportunity to accept an addition to the verdict of such amount as the court adjudges reasonable."⁷⁹ However, this sentence was amended in 1967 and now reads "until the defendant has first been given an opportunity to accept an addition. . . ."⁸⁰ This amendment apparently produces the same result as the Rhode Island statute.

B. Development of Additur in Mississippi

Whether a trial court could add to or increase the verdict of a jury appears to have first been considered in Mississippi in 1852 in *Buck v. Little*.⁸¹ In that case an action of assumpsit was filed against the drawer of an inland bill of exchange. Although the bill was not protested, it was shown that the bill was drawn without authority. The jury returned a verdict against the defendant in the amount of the principal and interest of the bill. The trial court then added five percent to the amount of the jury's verdict, basing this increase upon a statute⁸² allowing five percent damages in actions on domestic or inland bills of exchange.⁸³ On appeal the High Court of Errors and Appeals ruled that neither the jury nor the trial court could have assessed the extra five percent damages since the statute in question applied only to bills protested for non-payment.⁸⁴ However, the court, noting that even if the statute had given the plaintiff a right to the extra damages, the trial court's addition to the jury's verdict was erroneous, held:

[A]s the jury had found a verdict for a specific sum of money, it was not competent for the court to render a judgment for any

⁷⁷R.I. GEN. LAWS ANN. § 9-23-1 (1956). In addition, the court must also give the plaintiff an opportunity to consent to a remittitur before it may grant a new trial due to excessive damages.

⁷⁸*Albro v. Vallone*, 90 R.I. 392, 158 A.2d 571 (1960).

⁷⁹MASS. GEN. LAWS ANN. ch. 231, § 127 (1956), as amended, MASS. GEN. LAWS ANN. ch. 231, § 127 (Supp. 1970).

⁸⁰MASS. GEN. LAWS ANN. ch. 231, § 127 (Supp. 1970), amending MASS. GEN. LAWS ANN. ch. 231, § 127 (1956).

⁸¹24 Miss. 463 (1852).

⁸²HUTCHINSON'S CODE art. 5, 642 (Act of May 11, 1837).

⁸³24 Miss. at 464.

⁸⁴*Id.*

greater amount. All that the court in such case was authorized to have done, was to have set the verdict aside and given the plaintiff a new trial. In adding to the amount of the verdict, the court was assuming the province of the jury.⁸⁵

The apparent position that no increase in the verdict of a jury by a trial court could be tolerated began to weaken when in *Stone-Lowe Cotton Co. v. Weil Bros.*,⁸⁶ decided in 1922, it was held that a trial judge could properly assess the damages in the amount sued for on a contract when the jury found for the plaintiff in general terms and did not mention the amount of their verdict.⁸⁷ In 1929 the Mississippi Supreme Court held in *Collins v. Carter*⁸⁸ that in an action on an open account, if the jury returned a verdict for the plaintiff without mentioning interest, the trial court could properly increase the verdict by the amount of interest to which the plaintiff might be entitled, since such action would be only a matter of mathematical computation.⁸⁹ In at least two other instances,⁹⁰ both involving damages which were liquidated, undisputed, or capable of determination by mathematical computation, the supreme court either allowed an increase in the jury's verdict by a trial court to stand⁹¹ or added a sum to the verdict itself.⁹²

In 1963 a clear position concerning the constitutionality of an additur order in cases involving unliquidated or disputed damages was finally rendered by the Mississippi Supreme Court in *Woodmansee v. Garrett*.⁹³ Woodmansee, the plaintiff, obtained a \$365.00 judgment for personal injuries suffered as a result of a collision between a motor bicycle ridden by himself and a car driven by Garrett, the defendant. Woodmansee, after obtaining the judgment, filed a motion for a new trial on the issue of damages only. The trial judge entered a conditional order sustaining the motion for a new trial unless the defendant consented to a \$1,000 increase in the \$365 judgment within ten days. Defendant Garrett filed an acceptance to the conditional additur order within the proscribed time limit. However, plaintiff Woodmansee refused to accept the \$1,000 increase in the judgment and appealed the

⁸⁵*Id.*

⁸⁶129 Miss. 60, 91 So. 859 (1922).

⁸⁷*Id.* at 71, 91 So. at 861.

⁸⁸155 Miss. 600, 125 So. 89 (1929).

⁸⁹*Id.* at 604, 125 So. at 90.

⁹⁰*Ruffin v. J. & M. Schwabacher, Ltd.*, 156 Miss. 326, 126 So. 14 (1930); *Indianola v. Love*, 227 Miss. 156, 85 So. 2d 812, 86 So. 2d 871, 87 So. 2d 870 (1956).

⁹¹*Ruffin v. J. & M. Schwabacher, Ltd.*, 156 Miss. 326, 126 So. 14 (1930).

⁹²*Indianola v. Love*, 227 Miss. 156, 85 So. 2d 812, 86 So. 2d 871, 87 So. 2d 870 (1956).

⁹³247 Miss. 148, 153 So. 2d 812 (1963).

order to the supreme court. Defendant Garrett did not file a cross appeal but asked the supreme court to affirm the judgment against him, including the \$1,000 additur.

Although recognizing the inadequacy of the \$365 judgment, the supreme court reversed and remanded the case for a new trial on the issue of damages only,⁹⁴ holding that the acceptance by the defendant of the conditional additur order was not binding on the plaintiff.⁹⁵ Justice Rodgers, writing for the court, stated:

[W]e have come to the conclusion that where the amount in question is undisputed or liquidated, or the damage is fixed by law, or where the amount due may be determined by mathematical calculation, including interest, the trial court, or this Court on appeal, may add to the verdict of the jury so as to show the true amount due.⁹⁶

However, it was further stated that:

[T]he trial court cannot add to the verdict of the jury an additional sum as damages in unliquidated claims, nor can the trial court bind the plaintiff in a damage suit by adding to the verdict of the jury an additional award so as to circumvent the necessity of a new trial where the jury has returned an inadequate award of damages, and where a motion is made for a new trial on that ground.⁹⁷

In arriving at its decision not to allow additur where unliquidated or disputed claims are involved, the court apparently did not examine the historical and state versus federal constitutional questions involved. Rather, it based its decision upon the "general rule that a trial court does not have the power arbitrarily to increase the verdict of the jury without the *consent of the party prejudiced*, as this is violative of the constitutional guaranty of trial by jury."⁹⁸ However, "the party prejudiced" in the case of an additur refers to the defendant, not the plaintiff.

The Mississippi Constitution of 1890 provides: "The right to trial by jury shall remain inviolate. . . ."¹⁰⁰ It does not contain a re-examination clause as does the United States Constitution¹⁰¹ and, as has been

⁹⁴*Id.* at 157, 153 So. 2d at 816.

⁹⁵*Id.* at 152, 153 So. 2d at 814.

⁹⁶*Id.* at 156, 153 So. 2d at 816.

⁹⁷*Id.* at 157, 153 So. 2d at 816.

⁹⁸*Id.* at 156, 158 So. 2d at 816 (emphasis added).

⁹⁹5 AM. JUR. 2d *Appeal and Error* § 946 (1962).

¹⁰⁰MISS. CONST. art. 3, § 31.

¹⁰¹U. S. CONST. amend. VII.

pointed out, the seventh amendment to the Federal Constitution is not binding upon the states.¹⁰² Six years prior to the *Woodmansee* decision, the Minnesota Supreme Court in *Genzel v. Halvorson*¹⁰³ decided that additur is within the constitutional power of a court. In *Genzel*, decided under a statute¹⁰⁴ identical to article 3, §31 of the Mississippi Constitution, the court stated:

[A] reasonable appraisal [of the Minnesota constitutional provision] . . . compels the conclusion that the practice of using additur is in the interest of the sound administration of justice . . . [and that a] . . . trial court [is] within its constitutional power in raising the amount of damages with the consent of the defendant. This practice avoids the necessity of a new trial with its accompanying expense and delay. It does not prejudice the plaintiff's interests any more than the use of remittitur prejudices those of defendant.¹⁰⁵

Thus, regardless of the positions taken by other jurisdictions, the status of additur in Mississippi, in light of *Woodmansee*, prior to its statutory authorization by the legislature was that the practice was allowed in cases involving liquidated or undisputed damages or where the damages were capable of being determined by mathematical calculation or fixed rules of law. However, its use was forbidden when the damages in question were unliquidated or disputed.

IV. STATUTORY AUTHORIZATION OF ADDITUR AND REMITTITUR IN MISSISSIPPI

Mississippi Code §1686.5, effective March 23, 1971 provides:

The Supreme Court or any other court of record in a case in which money damages were awarded may overrule a motion for new trial or affirm on direct or cross appeal, upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of fact was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence. If such additur or remittitur be not accepted then the court may direct a new trial on damages only.¹⁰⁶

¹⁰²See note 39, *supra*; see, e.g., *Masonite Corp. v. Lochridge*, 163 Miss. 364, 141 So. 758 (1932), which recognized that federal court decisions construing the seventh amendment are not binding on state courts dealing with similar provisions in their own constitutions.

¹⁰³80 N.W.2d 854 (Minn. 1957).

¹⁰⁴MINN. CONST. art. 1, § 4.

¹⁰⁵80 N.W.2d at 859.

¹⁰⁶MISS. CODE ANN. § 1686.5 (Supp. 1971).

Apparently the statute is absolute in its terms. The phrase "case in which money damages were awarded" should reasonably be interpreted to mean all damages, including disputed or unliquidated damages, and not only those damages which are undisputed, liquidated, ascertainable by fixed rules of law, or determinable by mathematical calculation. The basis upon which an additur or remittitur order may be entered is that the award is excessive or inadequate due to "bias, prejudice, passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence." In this sense the status of remittitur in Mississippi is unaffected, since it has been held that a remittitur may properly be entered for these reasons.¹⁰⁷ Thus, the statute has only the effect of codifying existing case law concerning remittitur in Mississippi.¹⁰⁸

A problem is encountered, however, in interpreting the language of the statute. The last sentence states that if the additur or remittitur order "be not accepted then the court may direct a new trial on damages only." The question arises—accepted by whom? In the case of additur, must the plaintiff, the defendant, or both accept the increase in the verdict? If the term "additur" is defined in its conventional sense, the answer would be the defendant.¹⁰⁹ However, considering *Woodmansee*, this sentence could be interpreted to mean both the plaintiff and the defendant.¹¹⁰ In addition, if this provision means both the defendant and plaintiff must accept an additur order, it seems a logical conclusion that the same would now apply to remittitur.

V. CONCLUSION

In light of the *Woodmansee* decision, the constitutionality of § 1686.5 of the Mississippi Code will probably have to face a test before the Supreme Court of Mississippi. If and when it does, a crucial question will be a determination of whether the additur practice denies a plaintiff his right to determination of a factual issue (amount of damages) by a jury. In this respect, it has been said:

It is true that the practical effect of additur is to give the plaintiff an award based upon a finding made ultimately by the trial court. Courts often determine fact issues, however, and the acceptance of this practice over many years refutes the

¹⁰⁷*Whitten v. Land*, 188 So. 2d 246 (Miss. 1966); *Rayner v. Lindsey*, 243 Miss. 824, 138 So. 2d 902 (1962).

¹⁰⁸*Whitten v. Land*, 188 So. 2d 246 (Miss. 1966); *Rayner v. Lindsey*, 243 Miss. 824, 138 So. 2d 902 (1962).

¹⁰⁹*Bender*, *supra* note 1.

¹¹⁰*See Woodmansee v. Garrett*, 153 So. 2d at 816.

argument that the framers of the Constitution regarded the jury as the only competent find of facts.¹¹¹

In conclusion, it is submitted that a plaintiff is not deprived of his right to have a jury determine the amount of damages, a factual issue, since:

(a) He receives more, not less, than that which was awarded him by the jury in its verdict.

(b) He receives the full amount of damages that a reasonable jury might award.

(c) If he is dissatisfied with the amount of the award after the additur has been entered, he can still appeal on the ground that the award is inadequate.¹¹²

S. T. Rayburn

¹¹¹Jehl v. Southern Pacific Co., 427 P.2d at 994.

¹¹²See Markota v. East Ohio Gas Co., 97 N.E.2d 13, 19 (Ohio 1951).

STUDENT NOTES

EVIDENCE — OUT OF COURT STATEMENT AS NON-HEARSAY

The recent case of *Chambers v. State*¹ clearly demonstrates the confusion that can result from the use of a "shotgun approach"² to the hearsay rule. The Supreme Court of Mississippi used this approach with its corresponding emphasis on the character of the testimony to hold that oral out-of-court third party confessions were hearsay even when the third party declarant was himself present in court and had testified to a subsequent written confession and his repudiation of it.

It is obvious that in the fact situation that existed at the time the testimony was sought, it was not hearsay testimony and should not have been excluded for that reason. Such a holding evidences both a failure to correctly analyze the situation and a lack of understanding of the hearsay rule and its function.

This note will show that while the testimony was erroneously excluded as hearsay due to the factual situation, the testimony was inadmissible on other grounds. And lastly, the note will examine the purpose and function of the hearsay rule as it relates to this type of testimony when the testimony is sought as substantive evidence.

I. The Facts

Aaron Liberty, a part-time policeman, was killed when he was struck by four bullets fired from a dark alley. Leon Chambers was indicted for his murder, and a trial date was set. However, before Chambers went to trial Gable McDonald, an illiterate black, went to the office of Chambers' attorneys and, in answer to their questions, confessed that he had killed Liberty. His statement was then typed and read to him, and it was "signed by mark and sworn by McDonald."³

McDonald was arrested and brought before a justice of the peace for his preliminary hearing. At this time he completely repudiated his confession and stated that a Reverend Stokes had induced him to make it by promising that the confession was only for the purpose of bringing a civil suit against the town and that it would not be used against him criminally. He further testified that Stokes had told him that one-third of the proceeds of the suit would be given to him.

During the course of Chambers' trial the eyewitness testimony was contradictory. Some of it identified Chambers as the assailant, while other witnesses testified that McDonald had done the shooting.

The defense called McDonald as a witness, and he was allowed to testify as to his confession, the circumstances surrounding it, and his

¹252 So. 2d 217 (Miss. 1971).

²The term "shotgun approach" refers to the practice of classifying all out-of-court statements as hearsay merely because of their out-of-court character and with no consideration given to the purpose for which such statements were sought.

³*Chambers v. State*, 252 So. 2d 217, 218 (Miss. 1971).

repudiation of it. He further denied that he had killed Liberty or that he had had any part in Liberty's death. The defense was not allowed to cross-examine McDonald as an adverse witness.

After McDonald's testimony the defense sought to introduce two witnesses, Berkley Turner and Albert Carter. Turner testified in the absence of the jury that McDonald had confessed to him the night of the shooting. The trial judge ruled that this testimony was hearsay and would not allow Turner to testify before the jury. Thomas Russ testified, also in the absence of the jury, that McDonald had come to his house and confessed to him the day after the murder. The trial judge again refused, on the same basis of hearsay testimony, to allow the witness to testify before the jury.

The supreme court, affirming Chambers' conviction, held that the offered testimony was inadmissible as hearsay, citing 22A C.J.S. *Criminal Law*, Section 749⁴ as the controlling authority.

Two alternative theories serve as the basis for holding that this exclusion of the testimony as hearsay was erroneous:

1. The testimony was sought not for the purpose of proving the truth of the matter stated therein, but for the purpose of impeachment by showing prior contradictory statements and is admissible as an independent relevant fact.

2. Alternatively, even if the testimony was sought for hearsay purposes, the policy factors upon which the hearsay exclusion rest are not applicable in this type of situation.

II. The Hearsay Rule⁵

The hearsay rule is, on its face, very simple. It says that "hearsay evidence must be excluded from the jury."⁶

McCormick defines hearsay evidence as

⁴22A C.J.S. *Criminal Law* § 749 at 1115 (1961) states:

The extrajudicial declarations of a person other than accused, confessing or tending to show that he committed the crime, are generally held not to be competent for accused, for, although the latter may exculpate himself by proving, if he can, that someone with whom he was not connected committed the crime with which he is charged, he cannot do so by hearsay.

However, 22A C.J.S. *Criminal Law* § 752 at 1117-1118 (1961) states:

A statement, however, of a witness, made outside the presence of the accused, including a statement made to the prosecuting attorney, or a confession of the crime by a witness, is admissible solely to impeach the witness; and when such statements contradict his testimony they may be proved, not as independent evidence or substantive proof of the fact stated, but only . . . as affecting the credibility of the witness.

⁵For a good discussion of the background and development of the hearsay rule see 5 J. WIGMORE, *EVIDENCE* § 1364 (3d ed. 1940) [hereinafter cited as WIGMORE].

⁶*Wells v. Shipp*, 1 Miss. (Walker) 353, 354 (1829).

[T]estimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.⁷

While this definition is by no means exhaustive, it does contain the essence of the hearsay test. It is readily discernible that the test for hearsay is a tripartite one. In order for specific testimony to be excluded as hearsay, it must (1) be based on a third party's out-of-court statement, (2) be sought as proof of the truth of the out-of-court statement, and (3) depend upon the out-of-court third party for its credibility.

If any one of these requirements of character, purpose, and credibility is lacking, then the testimony is not hearsay and should not be excluded on that basis. Recognizing this, it becomes obvious that in order to apply the hearsay rule, the offered testimony must be examined within the context of the trial court situation and with a careful eye toward all of the issues involved therein. The necessity of this "contextual analysis" can hardly be overemphasized.⁸ It is only through the use of this medium that the hearsay purpose test can be answered.

The importance of the hearsay purpose test is that it recognizes the inappropriateness of the hearsay rule in certain situations. Such an inappropriate situation is the one in which the testimony is introduced for the purpose of proving that the out-of-court statement was in fact made, regardless of the truth or falsity of the words spoken.⁹

In order to fully comprehend the nature of this distinction it must first be recognized that the exclusion of testimony because it is hearsay reflects only on the *competence* and *credibility* of the testimony¹⁰ "and involves no assertion that hearsay statements are without probative force or that they can furnish no logical basis for conclusion of fact, assuming, of course, they are logically relevant to some issue."¹¹

Since "[t]he basis of exclusion [of hearsay testimony] is that the value of such a statement depends upon the competency and credibility of the out-of-court declarant rather than upon the competency and

⁷C. McCORMICK, LAW OF EVIDENCE § 225 at 460 (1954) [hereinafter cited as McCORMICK].

⁸It is a failure to "contextually analyze" that typifies the "shotgun approach."

⁹Such as in the case of slander, deceit, the making of a promise, or the speaking of marriage vows. For a good discussion of this general area see Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 488 (1937); McCORMICK § 228.

¹⁰The competency and credibility of the testimony is involved because "if the statement of X [an out-of-court declarant] is offered as tending to prove the truth of what X stated, then no matter how accurate and truthful the witness, his testimony is still subject to all the dangers of possible defects in the perception, memory, narration and veracity of X." Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1, 5-6 (1937).

¹¹*Citizens Bank v. Miller*, 194 Miss. 557, 566, 11 So. 2d 457, 459 (1943).

credibility of the witness"¹², whenever the testimony is relevant¹³ for some purpose which does *not* involve the credibility or competence of the out-of-court declarant (i.e., the truth or falsity of the statement), then the hearsay rule is inapplicable. Neither the purpose nor the credibility part of the hearsay test is met.

The Mississippi Supreme Court recognized this basic distinction when it held:

Where the fact that a particular statement was made is of itself a relevant fact, regardless of the truth or falsity of such statement, the statement is admissible as an independently relevant fact.¹⁴

If the fact that Liberty had made two previous confessions, regardless of the truth or falsity of the confessions themselves, was relevant to a fact in issue and was sought for that purpose, then obviously the testimony of Turner and Carter as direct eyewitness testimony to the fact that the statements were made was not hearsay and should not have been excluded for that reason.

In order to determine whether the offered testimony in the instant case was sought for some relevant purpose other than hearsay, it is necessary to examine the testimony within the context of the trial. In the instant case the main issue was, "Did Chambers kill Liberty?"

Eyewitness testimony indicated that either Chambers or McDonald did the killing; McDonald testified in court that he did not kill Liberty.

In this fact situation, McDonald's testimony is very crucial. If the jury believes that McDonald is telling the truth, they will probably find Chambers guilty. Therefore the *credibility* of McDonald is a decision issue in the trial. However, even if his testimony were not so important, the very fact that he took the stand and testified placed his credibility into issue.¹⁵ Is the fact that McDonald previously confessed to two different people on two different occasions relevant to the issue of McDonald's credibility—regardless of the truth or falsity of the confessions? It is obvious that the fact that McDonald made the statements is of the highest probative worth and that Turner and Carter were competent witnesses to testify on that issue. The Mississippi courts,¹⁶ as well as the courts in most other jurisdictions,¹⁷ recognize

¹²Goodman, *Hearsay Evidence*, in EVIDENCE 66 (M.L.I. 1968); see also McCORMICK § 225, at 459; Morgan, *Some Suggestions for Defining and Classifying Hearsay*, 86 U. PA. L. REV. 258 (1938).

¹³"Evidence is relevant testimony if it tends to prove a material fact in issue" T. McELROY, MISSISSIPPI EVIDENCE 116 (1955).

¹⁴Handshoe v. Daly, 211 Miss. 189, 193, 51 So. 2d 230, 232 (1951).

¹⁵Kolb v. State, 129 Miss. 834, 851, 93 So. 358, 361 (1922); See also, 98 C.J.S. Witnesses § 460 (1957).

¹⁶Darby v. State, 121 Miss. 869, 876, 84 So. 6, 7 (1920).

¹⁷McCORMICK § 34; 3 WIGMORE §§ 1017-1046.

the value of prior inconsistent statements as a method of impeaching a witness's credibility. And in this case there are strong grounds for suspecting the credibility of McDonald because the inconsistent statements were made after the motive to falsify arose, while the three consistent statements were made while there was no motive to lie.¹⁸

The relevancy of the testimony for this nonhearsay purpose makes it clear that this testimony is direct eyewitness testimony as to the statements being made and is not dependent upon the credibility or competency of the declarant for its value. It therefore cannot be hearsay.

III. Proper Exclusion

While this discussion has shown that the sought testimony was improperly excluded under the hearsay rule, the proper objection should be apparent from the results of the purpose test. The purpose of introducing the testimony of Carter and Turner was to impeach the credibility of McDonald by showing the prior inconsistent statements. Although Mississippi recognizes the use of prior inconsistent statements to impeach the credibility of a witness's testimony on the stand, this use is limited in two major ways. First, a witness cannot be impeached by use of prior statements unless a foundation or predicate be laid.¹⁹ If the witness has not had a chance to admit and explain the inconsistencies in his statement, then he cannot be impeached by showing prior inconsistent statements.²⁰ Secondly, one cannot impeach his own witness unless the witness is adverse or the calling party can plead surprise.²¹

In the instant case the defense sought to have McDonald classified as an adverse witness in order to be able to lay the predicate for his impeachment, but the trial court refused. The supreme court sustained this refusal on the basis that "McDonald's testimony was not adverse to appellant Chambers; it was merely in McDonald's defense and in explanation of his unusual confession. Nowhere did he point the finger at Chambers."²²

It was this ruling, rather than the hearsay rule, that should have been used as the basis for the exclusion of the testimony of Turner and Carter.²³ The objection should have been either that the defense had not laid a predicate for the impeachment of the witness or that the defense was attempting to impeach his own witness.

¹⁸For a good discussion of the admission of statements which antedate a motive to lie, see Judge Hand's opinion in *Di Carlo v. U.S.*, 6 F.2d 364 (2nd Cir. 1925).

¹⁹*Bonelli v. Bowen*, 70 Miss. 142, 149, 11 So. 791 (1892).

²⁰*McCORMICK*, *supra* note 7, § 37.

²¹*Hall v. State*, 250 Miss. 253, 264, 165 So. 2d 345, 350 (1964). For a comprehensive discussion of the basis for this rule see 3 WIGMORE §§ 896-899.

²²252 So. 2d at 220.

²³It will also be hard to prove surprise in the light of McDonald's previous repudiation of his guilt.

While it is apparent in the situation existing in this case that these rules result in the exclusion of very relevant and competent testimony, discussion of the rules themselves is beyond the scope of this note. However, it should be noted that this prohibition against impeaching one's own witness is a dying doctrine and has been recognized as such by many legal scholars.²⁴ In fact, both the Uniform Rules of Evidence²⁵ and the proposed Federal Rules of Evidence²⁶ have abandoned it and allow the calling party to impeach his own witness.

IV. The Spirit of the Hearsay Rule

An alternative theory is also available to demonstrate the inappropriateness of the hearsay rule in this type of situation. This is an "outside-of-the-spirit of the hearsay rule" approach.

If the situation that existed in the trial court is viewed in the light of the *purpose* and *function* of the hearsay rule, it is obvious that even if the sought testimony is hearsay within the "letter of the law," it is not hearsay within the "spirit of the law."

The exclusion of hearsay evidence is based on a feeling that such evidence is basically untrustworthy and therefore should not be allowed before the finder of facts.²⁷ The primary basis for this concern is described by Strahorn in the following passage:

One of the psychological assumptions implicit in the law of evidence is that all human testimony in its natural state is too untrustworthy to be considered by a jury unless its narration be conditioned in a manner calculated so to improve it in trustworthiness as to avoid the danger of the jury's being deceived into an erroneous verdict.²⁸

This belief in the "natural untrustworthiness" of human testimony led to the establishment of safeguards or "conditioning devices," which were designed to "encourage" the witness to be truthful in his testimony. Examples of these conditioning devices, the oath, the penalty for perjury, public testimonial narration in the presence of the fact finder, and cross-examination are familiar products of this concern.²⁹

The hearsay rule is another product of this concern.³⁰ The purpose of the hearsay rule is to exclude from the jury testimony which has a

²⁴See Ladd, *Impeachment of One's Own Witness—New Developments*, 4 U. CHI. L. REV. 69 (1936); McCORMICK, *supra* note 7, § 38.

²⁵UNIFORM RULES OF EVIDENCE, rule 20 cited in McCORMICK, *supra* note 7, at 111, n. 2.

²⁶PROPOSED FEDERAL RULES OF EVIDENCE 607 (Rev. Draft March 1971).

²⁷J. Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 486 (1937).

²⁸*Id.* at 484.

²⁹*Id.*

³⁰*Id.* at 486.

doubtful quality of truth because it "is not subject to the tests which ordinarily can be applied for the ascertainment of the truth of testimony."³¹ The fact that hearsay testimony is, in reality, a disguised form of "testimony in its natural state,"³² as well as the lack of the oath (and accompanying penalty for perjury)³³ and the lack of the opportunity for cross-examination³⁴ have all been raised as objections to its use as evidence.³⁵

Today, however, most authorities agree that the major defect in hearsay testimony is the lack of opportunity to cross-examine the absent declarant,³⁶ thus denying the adversary the opportunity to expose any defects in the declarant's perception, memory, narration, and veracity.³⁷ In the absence of any evidence on these factors, the finder of fact is unable to determine the credibility of the declarant.³⁸

The specific concern that the Mississippi courts have with out-of-court third party confessions and the hearsay rule is demonstrated in *Brown v. State*.³⁹ In that case the defendant Brown tried to introduce testimony to show that his brother had confessed to committing the crime with which Brown was charged. The brother could not be found at the time of the trial, so Brown sought to prove his confession by the testimony of the sheriff to whom his brother had confessed. In upholding the trial court's exclusion of the testimony as hearsay, the court quoted from *Lyon v. State*:

All one defendant would have to do would be to admit that his guilty accomplice was innocent and that he himself had perpetrated the crime, absent himself so as to enable the party on his trial to have the benefit of his admission, and, after his acquittal, appear, demand his trial, and prove by the evidence of the acquitted party that he was in fact the guilty person.⁴⁰

Of course, the logic behind this holding is unassailable. However, this logic does not have the same force when it is applied to the situation, as in *Chambers*, in which the declarant is himself in court and capable of testifying. In fact, when the situation in *Chambers* is viewed in the light of the *purpose* of the hearsay rule—to exclude untrustworthy testimony from the jury—the application of the hearsay rule is clearly inappropriate. The declarant is now in court and available for testimony under oath before the jury and available for cross-examination; he is

³¹Pevey v. Alexander Pool Co., 244 Miss. 25, 31, 139 So. 2d 847, 850 (1962).

³²And therefore subject to the taint of "natural untrustworthiness." Strahorn, *supra* note 27, at 486.

³³Pevey v. Alexander Pool Co., 244 Miss. 25, 139 So. 2d 847 (1962).

³⁴Morgan, *supra* note 10, at 3-4; McCORMICK § 224.

³⁵For a more indepth analysis of these factors see 5 WIGMORE § 1362; McCORMICK § 224; T. McELROY, MISSISSIPPI EVIDENCE § 18 (1955).

³⁶Goodman, *supra* note 12, at 66; McCORMICK § 224; 5 WIGMORE § 1362.

³⁷Morgan, *supra* note 10, at 3-4.

³⁸Goodman, *supra* note 12; Morgan, *supra* note 10.

³⁹99 Miss. 719, 55 So. 961 (1911).

⁴⁰22 Ga. 399, 401 (1857).

subject to all of the devices designed to give his testimony more trustworthiness. Therefore none of the risks normally associated with hearsay testimony are present.⁴⁰

A more important result of such a misapplication of the rule is that the defendant is denied the full effect of the "beyond a reasonable doubt" standard for conviction. The fact that McDonald allegedly had freely confessed his guilt on two different occasions would be very substantial evidence in the minds of the jury as to whether McDonald was the killer or not. If there is a reasonable doubt as to McDonald's innocence, then it must follow that there is most definitely a reasonable doubt as to Chambers' guilt.

While admission of this type of highly relevant testimony could possibly encourage some minimal type of "witness fixing" in certain cases, all of the testimony would be given under oath before the jury and with ample opportunity for cross-examination. Does this not make the testimony at least as trustworthy as a dying declaration or a declaration against interest? In fact, had McDonald been unavailable, the declaration would have been admissible under the PROPOSED FEDERAL RULES OF EVIDENCE as a declaration against penal interest.⁴² Is it logical to say, then, that because he is available his declaration is no longer trustworthy? Since McDonald was available to either explain or deny the testimony of Carter and Turner, their testimony as well as his should be more trustworthy. Therefore the testimony should have been recognized as an exception to the hearsay rule and admitted on that basis.

Conclusion

It is always discouraging to see a court of last resort completely misapply the law in any situation, but it is even more appalling in this situation, because this misinterpretation resulted in the expansion of a doctrine that is being seriously questioned on many different fronts.⁴³ In the legal world today the hearsay rule is gradually being "excepted to death." Its death is a slow but sure one. Faced with the competing policy factor of "hearsay evidence is better than no evidence,"⁴⁴ the hearsay exclusion is losing ground, and most writers agree that it has lost much of its bite.⁴⁵ Whether it will be completely abolished or whether it will merely be severely restricted is open to debate. It is a certainty that misapplication of the hearsay rule can result in a grievous injustice.

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⁴¹Morgan says that "there is one situation where the courts are prone to call hearsay what does not in fact involve in any substantial degree any of the hearsay risks. When the Declarant is also a witness, it is difficult to justify classifying as hearsay evidence of his own prior statements." Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 192 (1948).

⁴²PROPOSED FEDERAL RULES OF EVIDENCE 804 (b) (2) (Rev. Draft March 1971).

⁴³For a good summation of the different approaches see PROPOSED FEDERAL RULES OF EVIDENCE art. VIII Introductory Note (Rev. Draft March 1971).

⁴⁴*Id.*

⁴⁵Goodman, *supra* note 12, at 69.

A QUESTION OF VENUE

Questions of subject matter jurisdiction, personal jurisdiction, territorial jurisdiction, venue, and venue jurisdiction have often created confusion in Mississippi. Legislative action and judicial decision, while answering many questions, have frequently created new problems. This paper is limited to an examination of the Mississippi venue statutes, their application to resident individual citizens of this state before *Wofford v. Cities Service Oil Co.*,¹ and the possible influence that decision will have on future cases.

Venue denotes the place or the "county or district, wherein a cause is to be tried."² Until the *Wofford* decision, proper venue in Mississippi for an action brought against a resident individual was in the county in which that defendant or any other defendant of record could be found.³

The general venue statute applicable to resident individual citizens of this State is section 1433 of the Mississippi Code, which provides in part:

Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of them may be found. . . . If a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence, . . . the venue shall be changed, on his application, before the jury is impaneled, to the county of his household and residence. . . .⁴

This statute and prior statutes similar in wording have been construed by our court to mean that a default judgment taken against a resident defendant is void or voidable if no party defendant was served with process in the county of suit.⁵

When more than one resident defendant was sued, and venue was proper to one of them, it was proper to all.⁶ When no resident defendant was served with process in the county of suit, the court did not have "jurisdiction" and ordinarily could not render a valid judgment.⁷ However, even if a resident defendant was not served in the county of suit, a cause could be brought to trial if the defendant entered an appearance

¹236 So. 2d 743 (Miss. 1970).

²56 AM. JUR. *Venue* § 2 (1956).

³MISS. CODE ANN. § 1433 (1956).

⁴*Id.*

⁵See *Bryant v. Lovitt*, 231 Miss. 736, 97 So. 2d 730 (1957); *Perry v. Nolan & Maris*, 159 Miss. 384, 131 So. 252 (1930); *Cook v. Pitts*, 114 Miss. 39, 74 So. 777 (1917); *Campbell v. Triplett*, 74 Miss. 365, 20 So. 844 (1896); *Pate v. Taylor*, 66 Miss. 97, 5 So. 515 (1888); *Wolley v. Bowie*, 41 Miss. 553 (1867); *Bank of Vicksburgh v. Jennings*, 6 Miss. (5 How.) 425 (1841).

⁶*Daniel & Sams, Jurisdiction and Venue*, in *CIRCUIT COURT PRACTICE* 1, 39 (M.L.I. 1966).

⁷*Id.*

and specifically waived the improper venue,⁸ if he consented to suit in the wrong county,⁹ or if he entered a counterclaim.¹⁰

Before *Wofford* a resident individual citizen of Mississippi who was sued alone and out of the county of his residence had four choices: (1) Enter an appearance and move for a change of venue to the county of his residence; (2) appear and submit to the jurisdiction of the court; (3) fail to appear, allowing a default judgment to be taken against him, and set it aside by direct appeal; (4) allow a default judgment to be taken against him and set it aside by collateral attack.¹¹

It is submitted that the rule making default judgments void or voidable in cases of improper venue¹² evolved out of concepts of "territorial jurisdiction." Territorial jurisdiction is the concept which limits a court's power to hear cases to those properly brought within the area it serves. The concept springs from two common law theories: (1) The common law required initially that an action be maintained in the county where the wrong occurred so that jury members could base their decisions on personal knowledge of the facts,¹³ and (2) "with few exceptions, a court could only exercise its authority by judgment with respect to persons or property physically located within the territory served by the court."¹⁴

It appears that the process of a Mississippi court was effective in vesting that court with territorial jurisdiction only when a resident defendant was served with process in the county of suit by one of the three prescribed methods under section 1859.¹⁵ Failure of service on a resident defendant in the county of suit rendered process to other counties ineffective. Absent service on a resident defendant in the county of suit, the process of the court was limited to the borders of the county it served.¹⁶ The defendant, of course, could appear and submit to the jurisdiction of the court, thus vesting it with territorial jurisdiction, or he could appear and obtain removal to his home county. However, all too often the procedure was to allow the default judgment to be taken and then set it aside by direct appeal or collateral attack.¹⁷

Territorial jurisdiction has been described as follows:

[I]f no proper party defendant is found and served within the county by one of the methods authorized by law, service of process upon a non-local defendant, regardless of his classifi-

⁸See, e.g., *Indianola Cotton Oil Co. v. Crowley*, 121 Miss. 262, 83 So. 409 (1919).

⁹Cf. *Crosby v. Robertson*, 243 Miss. 420, 137 So. 2d 916 (1962).

¹⁰*King v. Ainsworth*, 225 Miss. 248, 83 So. 2d 97 (1955).

¹¹Dunn, *Venue in the Circuit Court*, 29 Miss. L.J. 1, 4-5 (1957).

¹²*Perry v. Nolan & Maris*, 159 Miss. 384, 387, 131 So. 252, 253 (1930).

¹³Miller, *Implementing Current Theories of Jurisdiction, Venue and Service of Process—Proposals for Revision of the Ohio Statutes*, 29 OHIO ST. L.J. 116, 118-19 (1968).

¹⁴*Id.* at 119.

¹⁵MISS. CODE ANN. § 1859 (1956).

¹⁶Dunn, *supra* note 11, at 4.

¹⁷See, e.g., *Bryant v. Lovitt*, 231 Miss. 736, 97 So. 2d 730 (1957).

cation, will not vest the court with territorial jurisdiction, and a default judgment based upon the ineffective service is voidable, if not void.¹⁸

It is apparent from many cases that if the venue of an action was improper in Mississippi, jurisdiction did not attach unless the defendant appeared and either directly or by his conduct waived any objection to venue. When venue was proper, the court had the requisite territorial jurisdiction.

The term "venue jurisdiction" has also been used by the Mississippi court.¹⁹ References to venue jurisdiction have appeared in cases in which "process was not valid since not properly issued."²⁰ It is submitted that the terms "venue jurisdiction" and "territorial jurisdiction" have substantially the same meaning. Both connote that a failure of service on a resident defendant in the county of suit will deprive the court of the power to try the cause. In this writer's opinion, when our courts speak in terms of venue jurisdiction and territorial jurisdiction they are, in most instances, dealing with questions of venue. The use of these terms tends to conceal the real question at issue.

An examination of several Mississippi cases will illustrate the weight traditionally given to proper venue. In an 1841 case, *Bank of Vicksburgh v. Jennings*,²¹ the plaintiffs sued multiple defendants on a promissory note made by the defendants and payable to the plaintiffs. Suit was filed in the Circuit Court of Warren County, and a writ issued to the sheriff of that county together with duplicate writs issued to the sheriff of Hinds County. The sheriff of Warren County returned the writ "not found as to all defendants." The sheriff of Hinds County returned the duplicate writs "executed on all the defendants." The defendants did not appear in the action, and a default judgment was taken against them. Subsequently all the defendants made affidavit to the Circuit Court of Warren County that they were resident citizens of Hinds County at the time the suit was brought, and the court set aside the default judgment, dismissing the cause for lack of jurisdiction. Affirming the lower court's action, the supreme court cited the applicable venue statute and said:

The statute provides that the defendant in a transitory action may be sued in the circuit court of the county in which he may be found, and enacts that if a freeholder be sued out of the county of his residence and freehold, the venue may be changed by order of the court.²²

Since suit was not brought in the proper venue, the judgment rendered against the defendants could not stand. No local defendant was served with process, therefore the duplicate writs were ineffective to bring the non-local defendants before the court.

¹⁸Dunn, *supra* note 11, at 4.

¹⁹Stanley v. Cruise, 134 Miss. 542, 99 So. 376 (1924).

²⁰Daniel & Sams, *supra* note 6 at 36.

²¹6 Miss. (5 How.) 425 (1841).

²²*Id.* at 426.

In 1867 in *Wolley v. Bowie*²³ suit was filed in the Circuit Court of Copiah County against several defendants, none of whom were found in that county. A duplicate writ to Hinds County was returned "found" on Ann Wolley. The suit was dismissed to all other defendants, and judgment was taken against her. Reversing the judgment and ordering the cause dismissed for want of jurisdiction, the Mississippi Supreme Court said that "[n]one of the defendants having been found in Copiah county, [their] dismissal ousted the court of its jurisdiction of the cause."²⁴

The court in 1896 restated the applicable law in *Campbell v. Triplett*.²⁵ Here the plaintiff sought a writ of attachment in the Circuit Court of Winston County. The writ was returned "no property found" in that county. Alias writs were issued to Attala and Leflore counties, but both returned "no property found." However, the defendant was served with process in Leflore County, the county of his household and residence. He did not appear, and a default judgment was taken against him. Reversing and dismissing the cause the supreme court said:

The venue of civil actions of this class is in the county in "which the defendants, or any of them, may be found," and if no defendant is served with process in the county in which the suit is brought, the jurisdiction of the court does not attach.²⁶

Its position with reference to the effect of improper venue was reasserted by the court in 1924 in *Perry v. Nolan and Maris*.²⁷ Nolan and Maris brought suit in Hinds County against Frank Payne, Inc., a Mississippi corporation with its principal place of business in Hinds County, and J. R. Perry, a resident citizen of Warren County, in an action for debt upon an open account. Process was served on Frank Payne as an individual, but not upon Frank Payne, Inc. Process was served upon defendant J. R. Perry in Warren County. Judgment by default was rendered against both defendants, and execution issued against Perry in Warren County. Perry appeared at a later term of court and moved to quash the writ of execution and vacate the judgment as void, because it was rendered without process upon any defendant in Hinds County. Upon the hearing of this motion, Frank Payne, Inc. entered an appearance in court and waived all errors so far as it was concerned, consenting to the judgment previously rendered against it. The Hinds County Circuit Court then overruled Perry's motion, and he appealed. Citing the relevant venue statute, the supreme court reversed, stating: "The judgment was voidable, if not void, in this state of the record."²⁸ The court reasoned that Frank Payne was served as an individual, not as an officer of the corporation, and he as an individual was not a party to

²³41 Miss. 553 (1867).

²⁴*Id.* at 554.

²⁵74 Miss. 365, 20 So. 844 (1896).

²⁶*Id.* at 367, 20 So. at 844.

²⁷159 Miss. 384, 131 So. 252 (1930).

²⁸*Id.* at 387, 131 So. at 253.

the action in any way. Therefore, the court had no jurisdiction of Perry, a resident citizen of Warren County, Mississippi.

As recently as 1957 in *Bryant v. Lovitt*,²⁹ the supreme court followed the general rule enunciated in the previous cases. Bryant was sued in Forest County, Mississippi, to recover a personal judgment for the value of merchandise sold to him by the plaintiffs. Bryant was not served with process in Forest County, but a writ did issue from Forest County to the sheriff of Jones County, the county of Bryant's household and residence. Service was effected upon him by leaving a copy of the summons with his wife under section 1859 of the Mississippi Code.³⁰ Bryant elected not to appear, and judgment by default was taken against him. Reversing this judgment, the supreme court agreed with Bryant's contentions that "he was not subject to suit in this type of action in Forrest County; that he had the right to be sued in the county of his residence and household, as provided by section 1433, and that the judgment against him is void."³¹

From the above cases, one can see that the Mississippi court's position has been uniform on judgments rendered by a court of improper venue. A resident defendant had to be served with process in the county of suit to vest the court with "proper venue," which was equated by our court with jurisdiction, territorial jurisdiction, or venue jurisdiction. Failure to obtain service in the forum county on any such defendant rendered a default judgment taken against a defendant void or voidable.

The other relevant venue statute, section 1441 of the Mississippi Code, which was adopted by our legislature in 1940, provides:

Where an action is brought in any circuit, chancery, county, or justice of the peace court of this state, of which the court in which it is brought has jurisdiction of the subject matter, but lacks venue jurisdiction, such action shall not be dismissed because of such lack of proper venue, but on objection on the part of the defendant shall, by the court, be transferred to the venue to which it belongs.³²

Of the cases discussed above, only one, *Bryant v. Lovitt*,³³ was decided after the passage of this statute, and no mention was made of it in that opinion.

It is submitted that *Wofford v. Cities Service Oil Co.*³⁴ departs from established precedent and holds that section 1441 gives a court power to proceed where venue is improper, absent an appearance by a defendant seeking removal to the county of his household and residence. It is likewise submitted that the line of cases discussed above, although apparently in direct conflict with *Wofford*, were not specifically overruled by, nor even mentioned, in the opinion.

²⁹231 Miss. 736, 97 So. 2d 730 (1957).

³⁰Miss. CODE ANN. § 1859 (1956).

³¹231 Miss. at 740, 97 So. 2d at 731.

³²Miss. CODE ANN. § 1441 (1956).

³³231 Miss. 736, 97 So. 2d 730 (1957).

³⁴236 So. 2d 743 (Miss. 1970).

Cities Service Oil Company sued Robert Gilder, said to be a resident of Hinds County, and Robert Harmon and F. C. Wofford, resident citizens of Chickasaw County, in a county court in Hinds County. Gilder and Harmon were sued on an open account, and Wofford was sued on a bad check he wrote to pay off the account.

No service of any kind was ever made on Gilder, the alleged resident of Hinds County. The two Chickasaw County defendants, Harmon and Wofford, were served personally in Chickasaw County. They failed to appear in the suit, and a default judgment was taken against them on December 20, 1966. A year and a half later on July 3, 1968, prodded by writs of garnishment, they filed a motion to vacate the default judgment taken against them. The county court refused to vacate the default judgment, and the circuit court affirmed the ruling of the county court. The two men appealed to the Mississippi Supreme Court, assigning as error that "the original default judgment of the county court was null and void because no service of process was had on the Hinds County defendant, Robert G. Gilder."³⁵

The court, citing section 1433³⁶ and section 1604,³⁷ declared that the requisite subject matter jurisdiction was present. The only question to be resolved was "venue jurisdiction."³⁸

Section 1441 was then quoted in the opinion, and the cases of *King v. Ainsworth*³⁹ and *Ainsworth v. Blakeney*⁴⁰ were cited as cases properly interpreting that section. With these cases as a foundation, the court affirmed the default judgment, holding that "timely objection was not made as specifically required by statute, that venue was thus waived, and that . . . the judgment of the county court . . . should be and is now affirmed."⁴¹

No basis for the court's holding in *Wofford* is revealed by an analysis of *King v. Ainsworth*. *King* involved a replevin action wherein appellee obtained judgment for the possession of an automobile previously sold by appellee to appellant under a conditional sales contract, the terms of which were allegedly breached by non-payment of the last six installments. Appellant contended that the venue of suit was not in Smith County because no proof was offered that either the car or appellant were found in Smith County. The court said the record was sufficient to establish both, either of which would have permitted the suit to be brought under section 2843.⁴² The court, stating it was not necessary to do so, did not set forth the evidence on the venue question. Of great significance was the fact that *the appellant made no objection to the jurisdiction of the court and filed no application for a change of venue*, and as the court pointed out:

³⁵*Id.* at 744-45.

³⁶MISS. CODE ANN. § 1433 (1956).

³⁷MISS. CODE ANN. § 1604 (Supp. 1968).

³⁸236 So. 2d at 745.

³⁹225 Miss. 248, 83 So. 2d 97 (1955).

⁴⁰232 Miss. 297, 98 So. 2d 880 (1957).

⁴¹*Wofford v. Cities Service Oil Co.*, 236 So. 2d at 746.

⁴²225 Miss. at 250, 83 So. 2d at 98.

*On the other hand he not only submitted to the jurisdiction by participating in the trial, but invoked the jurisdiction of the Circuit Court of Smith County by filing a counterclaim for damage. This constituted a waiver of any objection to the venue.*⁴³ (emphasis added).

The court's opinion that the venue was proper in *King* must be examined in the light of four relevant facts: (1) The defendant appeared in the action brought in the wrong venue; (2) the defendant entered no objection to the improper venue and did not seek to have the cause removed to the county of his residence; (3) the defendant participated in the trial by pleading to the merits; and (4) the defendant sought to assert a counterclaim against the plaintiff. It is respectfully suggested that this case merely holds that under this set of facts, venue was waived by the defendant, and that under section 1441 the court could not dismiss or transfer the action after the defendant had consented to trial in the improper venue and the jury had been impanelled.

The other case cited by the court to support its holding in *Wofford* was *Ainsworth v. Blakeney*.⁴⁴ This was a replevin action commenced in Smith County against several defendants, only one of whom was a resident of Smith County. This defendant, Burham Ainsworth, was held not to be a proper party to the action because "replevin lies alone against the party in possession at the time the action is begun."⁴⁵ Ainsworth did not have the required possession at the time of the commencement of the action. The court, however, held that venue had been waived by the other defendants, because they had appeared and participated in the action. The court supported its holding by pointing out that under "[s]ection 1433 Code of 1942, it is specifically required that an application for change of venue must be filed before the jury is impanelled."⁴⁶ It is submitted that at the time this statement was made, it held true only when a defendant who was sued in an improper venue appeared, and by pleading, consent, or asking for affirmative relief, waived the defect in venue. Until the jury was impanelled, the defendant could have the suit transferred to the proper venue; once the jury was impanelled, he was bound to trial in that county. Moreover, it should be noted that at the time of this decision the prevailing theory was that if the venue was improper, and the defendants did not appear, any default judgment taken against them was void or voidable.⁴⁷ In settling the venue question in this case the court held that, "[i]n the absence of timely objection by the defendants to the venue of Smith County, we think the question was not before the court. . . ."⁴⁸

This "absence of timely objection" theory was used by the court in *Wofford* to explain why the default judgment should stand. It is

⁴³*Id.* at 250-51, 83 So. 2d at 98.

⁴⁴232 Miss. 297, 98 So. 2d 880 (1957).

⁴⁵*Id.* at 304, 98 So. 2d at 883.

⁴⁶*Id.* at 306, 98 So. 2d at 884.

⁴⁷*See, e.g., Perry v. Nolan & Maris*, 159 Miss. 384, 131 So. 252 (1930).

⁴⁸232 Miss. at 306, 98 So. 2d at 884.

readily apparent that this theory does little to justify the court's holding in *Wofford*. In *Ainsworth* the defendants appeared and waived any objections that existed as to improper venue. They raised the question of venue after half the trial was completed, and since they had appeared, they were no longer entitled to a change of venue under section 1433.⁴⁹ In *Wofford*, on the other hand, the defendants did not appear at all, and under the old line of cases, including *Bryant v. Lovitt*,⁵⁰ the provisions of section 1433⁵¹ were not satisfied. The venue requirements of this section could be met only when a resident defendant was served with process in the county of suit. Absent service on such defendant, the court could not proceed to try a cause; therefore there could be no "absence of timely objection," since the defendants in *Wofford* were never brought within the terms of section 1433.⁵²

The pre-existing line of cases which explicitly spelled out the law prior to *Wofford* were not overruled or discussed in that opinion; so it is a valid assumption that they are still viable. On the other hand, *Wofford* is the most recent statement by our court in this area and should also be considered to be the law.

Therefore we have two conflicting rules of law with reference to improper venue and default judgments rendered by courts of improper venue. Under the old rule a default judgement taken in a county wherein no resident defendant was served with process, was void or voidable. Under the *Wofford* decision, a defendant is put under an affirmative duty to appear in the court of the county of suit and move for a change of venue. If he is a resident citizen of this state and is sued out of the county of his household, he must appear and at least assert his right to be sued in the county of his household, thus initiating removal. If he is served with process anywhere in the state and ignores it, he is subject to a default judgment which will be binding against him.

The *Wofford* decision raises many interesting questions. It appears to depart from the common law idea of territorial jurisdiction and hold that the process of a Mississippi court will be effective to bring a defendant before it as long as it is served on him anywhere in the state. If this is true, then the *Wofford* decision aligns Mississippi with a majority of the states, which provide either directly or by inference that process is valid throughout their state.⁵³ In most states the sole purpose of service of process is notice,⁵⁴ and the "purpose of venue is trial convenience."⁵⁵ As phrased by another writer, "The major purpose of service is to give the defendant notice of the action and a reasonable

⁴⁹MISS. CODE ANN. § 1433 (1956).

⁵⁰231 Miss. 736, 97 So. 2d 730 (1957).

⁵¹MISS. CODE ANN. § 1433 (1956).

⁵²*Id.*

⁵³Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307, 325-26. (1951).

⁵⁴*Id.* at 326.

⁵⁵*Id.*

opportunity to defend."⁵⁶ The majority position is stated in *American Jurisprudence* as follows:

Venue statutes relate to procedure, and not to jurisdiction, and the fact an action is tried in a county other than that declared by statute the proper county for its trial does not go to the jurisdiction and does not invalidate the judgment. . . . When a court has jurisdiction it has power, in the absence of an objection to the venue, to render a judgment binding on the parties.⁵⁷

In a majority of the states "[f]ailure to make a timely objection in the proper mode to a failure to comply with the statutory requirement as to the district or county in which an action is to be brought is a waiver of that objection."⁵⁸

The holding in *Wofford* will possibly cut out some needless litigation. Prior to *Wofford* a defendant could allow a default judgment to be taken against him and then set it aside by direct appeal or collateral attack, necessitating a new trial. Now, however, the default judgment will be binding on him. The burden is apparently placed on the defendant to appear in the action and either move for a change of venue or submit to the jurisdiction of the court.

The possible inequities this decision will work on future defendants do not appear too burdensome. It will cause inconvenience to a defendant sued in a county far removed from his household; he will be required either to engage a local attorney to make the long trip at the defendant's expense, or engage a local attorney and have him associate with an attorney in the county of suit to expedite removal, again increasing expenses.

As earlier indicated, *Wofford* has probably aligned Mississippi with the majority of states. Our process may now run throughout the state, free from theories of "territorial jurisdiction." When served with process, a defendant will have but three choices, (1) appear and move for a change of venue, (2) appear and submit to the jurisdiction of the court, or (3) not appear and allow a valid default judgment to be taken against him.

The major criticism of *Wofford* is not the result, but rather the fact that the court makes a bold statement of law completely opposite to pre-existing Mississippi law without adequately supporting or explaining its decision. No attempt is made to overrule, modify, or distinguish *Wofford* from the older line of cases. This leaves the attorney in Mississippi with two diametrically opposed rules on the same point of law, necessitating a "play it safe" approach to the problem.

It is hoped that when the court has this matter before it again the questions herein raised will be resolved.

Michael G. Soper

⁵⁶Miller, *Implementing Current Theories of Jurisdiction, Venue and Service of Process—Proposals for Revision of the Ohio Statutes*, 29 OHIO ST. L.J. 116, 120 (1968).

⁵⁷56 AM. JUR., *Venue*, § 38 (1956).

⁵⁸*Id.* at § 36.

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